Supreme Court of the United States

OCTOBER TERM, 1966

No. 1036

NATIONAL LABOR RELATIONS BOARD,
PETITIONER

vs.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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[fol. A]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

TWENTY-FIRST REGION

Case No. 21-CA-6160

FLEETWOOD TRAILER CO., INC.

and

LIONEL RICHMAN

COMPLAINT AND NOTICE OF HEARING—December 11, 1964

It having been charged by Lionel Richman, herein called Richman, that Fleetwood Trailer Co., Inc., herein called Respondent, has engaged in, and is engaging in, unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. Sec. 151, *et seq.*, herein called the Act, the General Counsel of the National Labor Relations Board, herein called the Board, on behalf of the Board, by the undersigned Regional Director, issues this Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended, and alleges as follows:

1. The charge was filed by Richman on September 10, 1964, and served on Respondent on September 10, 1964, by registered mail.

2. Respondent is now, and has been at all times material herein, a California corporation engaged in the manufacture of mobile homes, with its place of business at Riverside, California. In the course and conduct of its business operations, Respondent annually purchases and receives goods valued in excess of $50,000 directly from

[illegible] annually sells and distributes its products valued in excess of $50,000 directly to customers located at points outside the State of California.

[illegible] is now, and at all times material herein has been, an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

[illegible] 4. The San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein called the Union, is now, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

5. From on or about August 6, 1964, to on or about August 18, 1964, certain employees of Respondent ceased work unanimously and went out on strike.

6. On or about August 20, 1964, Mary Nevins, Lenny Painter, Luther Burnside, James Fuller, David Davis and Ronald Eisch, all of whom were employed by Respondent and who had engaged in the strike referred to in paragraph 5 above, made an unconditional offer to return to work.

7. Since on or about August 20, 1964, and at all times since, Respondent has failed and refused, and continues to fail and refuse, to reinstate the employees named in paragraph 6 above.

8. Respondent did fail and refuse, and continues to fail and refuse, to reinstate the employees named in paragraph 6 above for the reason that said employees had joined or assisted the Union, or engaged in other concerted activities for the purposes of collective bargaining or mutual aid or protection by participating in the strike described in paragraph 5 above.

9. By the acts described in paragraphs 7 and 8 above, and by each of said acts, Respondent did discriminate and is discriminating, in regard to the hire or tenure or terms of employment of its employees to discourage membership in a labor organization, and Respondent thereby did engage in, and is engaging in, unfair labor practices within the meaning of Section 8(a)(3) of the Act.

10. By the acts and conduct described in paragraphs 7 through 9 above, and by each of said acts, Respondent did interfere with, restrain, and coerce, and is interfering with, restraining and coercing, its employees in the exercise of their rights guaranteed in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8(a)(1) of the Act.

11. The acts and conduct of Respondent described in paragraphs 7 through 10 above, occurring in connection with the operations of Respondent's business described in paragraphs 2 and 3 above, have a close, intimate, and [fol. C] substantial relation to trade, traffic, and commerce among the several states, and have led, and tend to lead, to labor disputes burdening and obstructing commerce and the free flow of commerce within the meaning of Section 2(6) and (7) of the Act.

12. The acts and conduct of Respondent described in paragraphs 7 through 11 above constitute unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (3) and Section 2(6) and (7) of the Act.

PLEASE TAKE NOTICE that on the 3rd day of February 1965, at 10 a.m., PST, in Hearing Room # 1, Mezzanine Floor, 849 South Broadway, Los Angeles, California, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above Complaint, at which time and place you will have the right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, the Respondent shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and four copies of an answer to said Complaint within 10 days from the service thereof and that unless it does so all of the allegations in the Complaint shall be deemed to be admitted to be true and may be so found by the Board.

DATED at Los Angeles, California, this 11th day of December 1964.

/s/ Ralph E. Kennedy
Regional Director
National Labor Relations Board
Region 21
849 South Broadway
Los Angeles, California 90014

GENERAL COUNSEL'S EXHIBIT 1(c)

[fol. D]

* * * *

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

TWENTY-FIRST REGION

No. 21-CA-6160

FLEETWOOD TRAILER CO., INC.

and

LIONEL RICHMAN

RESPONDENT'S ANSWER

Fleetwood Trailer Co., Inc. ("Respondent") answers the Complaint in the above entitled matter as follows:

1. Answering paragraphs 1, 2, 3, 4, 5, and 6, Respondent admits the allegations of said paragraphs.

2. Answering paragraph 7, Respondent denies each and every allegation of said paragraph and alleges that Mary Nevins, Lonny Painter, Luther Malzahn, James Fuller, David Davis and Ronald Kluth were ordinary economic strikers and had been permanently replaced prior to their offer to return to work.

Respondent further alleges that Mary Nevins was offered reemployment on December 8, 1964 but stated that she was only recently out of the hospital and could not obtain medical permission to resume employment until "some time after Christmas".

Respondent further alleges that the other persons named were reemployed as follows:

Lonny Painter—November 2, 1964;
[fol. E] Luther Malzahn—November 2, 1964;
James Fuller—December 14, 1964;
David Davis—November 2, 1964;
Ronald Kluth—December 14, 1964.

3. Answering paragraphs 8, 9, 10, 11, and 12, Respondent denies each and every allegation of said paragraphs.

/s/ Hugh J. Scallon
GIBSON, DUNN & CRUTCHER
Attorneys for Respondent

GENERAL COUNSEL'S EXHIBIT 1(h)

[fol. F]

[Proof of Service by Mail—Omitted in printing]

[fol. 1]

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

TWENTY-FIRST REGION

Case No. 21-CA-6160

IN THE MATTER OF:

FLEETWOOD TRAILER CO., INC., RESPONDENT

and

LIONEL RICHMAN, CHARGING PARTY

TRANSCRIPT OF HEARING—Wednesday, February 17, 1965

Hearing Room 2, 849 South Broadway, Los Angeles, California

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 o'clock a.m.

BEFORE:

WALLACE E. ROYSTER, Trial Examiner.

APPEARANCES:

BRUCE H. BERRY, ESQ., 849 South Broadway, Los Angeles, California, appearing as Counsel for the General Counsel.

GIBSON, DUNN & CRUTCHER, By: HUGH J. SCALLON, ESQ., 9601 Wilshire Boulevard, Beverly Hills, California, appearing for the Respondent.

* * * *

[fol. 4]

* * * *

OFFERS IN EVIDENCE

MR. BERRY: I offer into evidence the formal documents in this case. They have been marked as General Counsel's Exhibits 1(a) through 1(i), inclusive, Exhibit

1(i) being a description and index of the formal documents.

They have already been shown to the opposition party.

MR. SCALLON: No objection.

TRIAL EXAMINER: All right. General Counsel's Exhibits 1(a) through 1(i) are received.

(The documents above referred to were marked General Counsel's Exhibits Nos. 1(a) through 1(i) for identification and were received in evidence.)

MOTION TO AMEND COMPLAINT AND GRANTING THEREOF

MR. BERRY: At this time I would like to move the complaint, Paragraph 7 and 8 in particular, be amended as follows:

"7. a. Respondent failed and refused to reemply Lonny Painter, Luther Malzahn and David Davis from on or about August 20, 1964 to on or about November 2, 1964.

"b. Respondent failed and refused to reemploy Mary Nevins from on or about August 20, 1964 to on or about December 8, 1964.

"c. Respondent failed and refused to reemploy Ronald Kluth and James Fuller from on or about August 20, 1964 to on or about December 14, 1964.

"Paragraph 8 to read as follows:

[fol. 5] "8. Respondent did fail and refuse to reemploy the employees named in paragraphs 6 and 7 above for the reason that said employees had joined or assisted the Union, or engaged in other concerted activities for the purposes of collective bargaining or mutual aid or protection by participating in the strike described in paragraph 5 above."

TRIAL EXAMINER: Were you aware of the tendency of this amendment?

MR. SCALLON: I was aware of it, Mr. Examiner, and I have no objection.

TRIAL EXAMINER: Very well. The complaint is amended as moved.

* * * *

MR. BERRY: At this time I would like to offer the [fol. 6] following stipulation:

"It is hereby stipulated that on October 8, 1964, Respondent hired Eddie Latinsky as a cabinet assembler to work on frames. On October 12, 1964, Respondent hired Gilbert Herrara as a cabinet assembler, Jimmy Benson as a flooring employee, and Everett Leffen as a sidewall employee. On October 13, 1964, Respondent hired Dwayne Nash as a finisher, and on October 16, hired Billy Valk as a cabinet setter. Respondent did not offer any of the above-named positions to Mary Nevins, Lonny Painter, Luther Malzahn, James Fuller, David Davis, or Ronald Kluth before hiring the above-named employees, and that Latinsky, Herrara, Benson, Leffen, Hash, and Valk had not previously worked for Respondent."

TRIAL EXAMINER: Is that your stipulation?

MR. SCALLON: So stipulated.

TRIAL EXAMINER: Very well. It is noted.

MR. BERRY: I call as my first witness James Fuller.

* * * *

Whereupon,

JAMES ERVING FULLER

[fol. 7] was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.

A My name is James Erving Fuller, 3943 Fourth Street, Riverside, California.

Q Where do you work, Mr. Fuller?

A Fleetwood Trailer Company.

Q When did you originally start working for Fleetwood?

A Approximately the middle of November, 1963.

Q What is your present job with Fleetwood?

A I am on a finishing crew.

Q Who is your foreman?

A Bill Heimer.

Q What is your job on the finishing crew?

A Ffnishing ceilings and washing them, and repairing various things.

Q How long have you been on the finishing crew?

A Since December of 1964.

Q So it would be about two months.

A Yes.

Q Did you have a job with Fleetwood before you were on the finishing crew?

A Yes.

[fol. 8] Q What job was this?

A I was bulkhead in the cabinet shop.

Q What were you doing with bulkheads?

A Making them.

Q When you were making or assembling bulkheads, what tools did you use?

A I used two sizes of staple guns, tape measure, power tools, such as router, and occasionally an electric air drill and hammer, a putty knife, and tape measure.

Q Who was your foreman while you were assembling bulkheads?

A The latest one?

Q Yes.

A Rod Reareta.

Q About how long did you assemble bulkheads?

A Approximately ten months.

Q Can you describe how you assembled a bulkhead?

A I would take precut lumber and put it on a jig, and then staple the lumber together and take it off the jig and remove the jig from the table and put the frame back on the table and glue down the frame and put panels on the frame, and staple that to the frame, rout it, or cut the edges down so that they are even on both sides of the frame, and take it off the table and give it to the next man that takes care of it.

[fol. 9] Q While you were assembling bulkheads did you have occasion to perform any other jobs?

A Yes.

Q How many?

A Approximately three or four.

Q Which jobs were these?

A The cutout saw, the table saw, put wardrobes on,

doors, and occasionally help it out on the kitchen counter table.

Q What did your job on the table saw consist of?

A Cutting panels to required sizes for panelling of wardrobes and walls.

Q How would you go about this job?

A The sheets come in 84 by 94 or 96 length, and you put it on the table saw and put the table saw on it and run it to width.

Q What was your job on the cutout saw?

A Cutout saw is precutting lumber for the frames. There again setting up length on the table saw and putting the lumber on the table saw and cutting through it.

Q What did you do at the door table?

A I would help put skins or panels on the frames and staple them and rout them, and balance the edges, and that would be it.

Q Now, on the wardrobe table what did your job consist of there?

[fol. 10] A Putting frames together on the jig, and putting panels on the frames.

Q Would this be similar to your job of handling bulkheads?

A Yes.

* * * *

[fol. 12]

* * * *

Q Have you observed a flooring employee at work?

A Yes.

Q What tools does a flooring employe use?

A Staple gun, hammer, electric air drill. Basically, that is his tools.

Q Does he use any saws of any type?

A Yes.

Q Which saws would these be?

A The saber saw.

Q From your observation, Mr. Fuller, describe how a flooring employee performs his job.

A Well, he has a jig, and he puts his lumber down on a jig and nails it together and he puts in the metal air

[fol. 13] ducts in the floor. He puts in plumbing where it is necessary, and puts his floor down—plywood flooring down—and cuts out the holes in the plywood to allow for the air ducts and plumbing pipes, and it moves around to the metal carriage.

Q When you say he nails it down, is this done by hammer and nails, or a staple gun?

A They have a large metal piece that has several nails protruding from it, and they use their hammers to nail this piece in.

Q Have you observed the cabinet setter at work?

A Yes.

Q What tool does a cabinet setter use?

A An air drill, hammer, screwdrivers.

Q Have you used any air tools while you have worked at Fleetwood?

A Yes.

Q From your observation, how does a cabinet setter perform his job?

A He takes the cabinets from the cabinet shop and places them on the floor of the trailer and screws it to the floor, and when they put the sidewalls on the trailer he secures the cabinetry to the sidewalls.

When they put the topping on the trailer he secures it to the top.

Q Does he secure them with a screwdriver?

[fol. 14] A With an air screwdriver.

Q In what part of the production line which you have previously described does the cabinet setter perform his operation?

A In the sidewalls department.

Q Have you ever observed a sidewall employee at work?

A Yes.

Q What tools does a sidewall employee use?

A Staple gun and hammer are his basic tools.

Q Describe how a sidewall is put together.

A He also has a jig and he makes a frame, and they panel it with different colors of panels and types of panels, depending on which room is along this sidewall. They drill holes or cut out holes for windows and doors, and

turn it over to insulate it, and then they put it on the trailer.

Q Do you consider a person assembling sidewalls to be similar to a person assembling bulkheads?

A Yes.

* * * *

[fol. 17]

* * * *

OFFERS IN EVIDENCE

MR. BERRY: I would like to have marked as General Counsel's Exhibit 2 for identification an application for employment form dated November 9, 1963, and signed by James E. Fuller.

(The document above referred to was marked General Counsel's Exhibit No. 2 for identification.)

MR. BERRY: And marked as General Counsel's Exhibit 3 for identification an application for employment dated August 19, 1964, with the name on top of James Erving Fuller.

(The document above referred to was marked General Counsel's Exhibit No. 3 for identification.)

Q (By Mr. Berry) Mr. Fuller, I show you General Counsel's Exhibit 2 for identification. I will ask you if you recognize this.

A Yes, sir.

Q Describe what it is, please.

[fol. 18] A Pardon me?

Q Can you describe what it is?

A It is an application I filled out for employment at Fleetwood.

MR. BERRY: I offer General Counsel's Exhibit 2 into evidence.

MR. SCALLON: No objection.

TRIAL EXAMINER: Without objection, it is received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 2, was received in evidence.)

* * * *

Q (By Mr. Berry) Mr. Fuller, I show you General Counsel's Exhibit 3 for identification and ask you if you recognize that.

A Yes, sir.

Q Describe what it is.

A It is an application form for employment at Fleetwood Trailer Company.

Q Can you tell us why you had made out a second application for employment?

[fol. 19] A When I returned after the strike they had me fill it out.

MR. BERRY: I offer General Counsel's Exhibit 3 for identification into evidence.

MR. SCALLON: No objection.

TRIAL EXAMINER: It is received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 3, was received in evidence.)

Q (By Mr. Berry) Mr. Fuller, after you made your initial offer to return to work in August of 1964, did you then again go to Fleetwood to see if there was any work available?

A Yes.

Q Approximately when did this occur?

A In September.

Q Was it the beginning of September, or middle part, or latter part?

A I am sorry. The latter part of September.

Q Who did you see?

A A gentleman in the front office. I don't know his name.

Q Do you know what position he occupied?

A I think he is an accountant.

Q Where did this meeting take place?

A In the front office.

Q Was anyone else present at the time?

[fol. 20] A Not to my knowledge.

Q About how long did the conversation last?

A Not more than ten minutes.

Q Describe what was said in this conversation.

A I came in and I said that I had been called from Seattle to go to work at Fleetwood, and I was supposed to see Bob Radcliffe.

He said that Bob was busy, and what did I want. I said I had been called to go to work, and he said, "We haven't been hiring in the last two or three weeks," and they didn't expect to in another two or three weeks.

But he went through a pile of applications and pulled out the one I had made in August and said, "Thankyou," and I left.

Q Excuse me. Did you redate the application at that time?

A Yes.

Q Who was Bob Radcliffe?

A He was production manager at the time.

Q I show you General Counsel's Exhibit 3, and above August 19, 1964, the date, there is a second date. Is that the time it was redated?

A Yes, sir.

MR. BERRY: Let the record show the date on top is September 28, 1964.

* * * *

[fol. 21] CROSS-EXAMINATION

Q (By Mr. Scallon) * * *

* * * * *

Q Just to make it a little clearer to the Examiner and people reading the record, the description of the operation of Fleetwood, would you say it is a fair description of the operation of Fleetwood to say that it is an assembly-line operation adapted to mobile homes?

A Yes, sir.

Q The first step is the construction of the metal frame, is that right?

A Yes, sir.

Q And then it is moved on to the next station where the floor is added?

A Yes.

Q And subsequently the walls are erected?

A Yes.

Q Until finally it reaches completion?
A Yes.
Q It follows a regularly scheduled process along this [fol. 22] line, is that correct?
A Yes, sir.
Q And the employees generally perform the same function on each trailer as it goes by?
A Yes, sir.
Q Mr. Fuller, you were in fact re-employed at Fleetwood on December 14, 1964, is that right?
A Approximately, yes.

* * * *

LUTHER MALZAHN

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.
A Luther J. Malzahn, 11124 Oriole Drive, Riverside.
Q Where do you now work?
A Fleetwood Trailer.
Q Approximately when were you originally hired by Fleetwood?
[fol. 23] A About May 12th.
Q Is that 1964?
A 1964.
Q What is your present job at Fleetwood?
A I work in the cabinet assembly shop.
Q Who is your foreman in the cabinet assembly shop?
A Right now it is Howard. I don't know his last name.
Q As cabinet assembler what tools do you use?
A Hammer, nail set, putty knife, screwdriver, plane, air drill, sander.
Q Now, what is your job as a cabinet assembler?
A Sanding the doors, painting them, and finishing them, and hinges.
Q Will you describe how you finish a door.

A Well, we first sand it—the edges of the door—or plane the edges of the door, whichever is required. Then we paint them and clean and inspect them and hinge them and drill the holes for the handles, and put them in a stock pile.

Q Now, have you ever had any other jobs at Fleetwood besides finishing doors?

A No.

* * * *

[fol. 26]

* * * *

Q (By Mr. Berry) Now, after you went down to Fleetwood after the strike in August, 1964, did you again go down to Fleetwood to see if there was any employment?

A Yes.

Q Approximately when was this?

A The latter part of August.

Q Did you go down after this—after the latter part of August?

A After the latter part of August? You mean the second time?

Q Yes.

A Yes.

Q When was this second time, approximately?

A I believe in October.

Q Who did you see at this time?

[fol. 27] A Two men in the front office.

Q Do you know what their names were?

A No.

Q How long did the conversation last?

A I asked them if there was any work for me, and they asked me who I was, and they got my application out and had me to sign it and said they would call me if they needed me.

Q Is this the same application you had filled out originally?

A That was my original application. I made another application when I went back the first time after the strike.

* * * *

[fol. 28]

* * * *

RONALD KENNETH KLUTH

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.
A Ronald Kenneth Kluth, 5971 Tyler Avenue in Riverside.
Q Where do you work now, Mr. Kluth?
A Fleetwood Trailers.
Q When did you originally start working for Fleetwood?
A About the middle of September of 1963.
[fol. 29] Q What is your present job at Fleetwood?
A Right now?
Q Right now.
A Cabinet shop, assembling drawers.

* * * *

Q When making drawers what tools do you use?
A Staple gun and hammer.
Q Are those the only tools you use?
A Yes. And a sander and air drill.
Q Describe how you go about making a drawer.
A We have precut materials and you put your backs and two sides on and staple them together and put your bottom on and put your front on, and that makes your box, and you have the prefinished facing to go onto it, and you sand it and paint it, and staple your—glue and staple your facing to the box and drill your holes, and it is completed.
Q Have you had any other jobs while at Fleetwood?
A Yes. I have made room dividers.
Q How did you go about making room dividers?
A We have the precut material and use a jig and staple it together and sand it and paint it, and hang the doors.

Q When you say hang your doors, you mean hang [fol. 30] them in the racks or—

A The room divider—when I was making them they had a little desk and you sanded and painted and hinged your desk lid and put it to the divider, and it was made into a little desk.

Q Now, when you went back to work after the strike what job were you doing at that time?

A Lagging.

Q Describe what lagging is.

A You drill your holes through the outriggers. The holes are in outriggers and you drill through the floors and through the sidewalls and bolt them, and you use an air gun for tightening the bolts.

Q Now, when you say outriggers, Mr. Kluth, what is an outrigger?

A It is pieces of metal that comes out on your chassis.

Q Did you use any other tools while lagging besides an air gun and a drill?

A A ratchet wrench, and sometimes a hammer.

* * * *

[fol. 32]

* * * *

MR. BERRY: I would like to have marked as General Counsel's Exhibit 5 for identification "Application for Employment" dated August 8, 1963, and signed by Ronald Kluth.

(The document above referred to was marked General Counsel's Exhibit No. 5 for identification.)

MR. SCALLON: I will stipulate that is the application.

TRIAL EXAMINER: That was filed on that occasion?

MR. SCALLON: Yes.

OFFER IN EVIDENCE

MR. BERRY: I offer this as General Counsel's Exhibit No. 5.

[fol. 33] TRIAL EXAMINER: The stipulation is noted, and General Counsel's Exhibit 5 is received.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 5, was received in evidence.)

Q (By Mr. Berry) Mr. Kluth, on General Counsel's Exhibit 5 there is a date above the original date which is September 9, 1963. That is the date you went to work, is that correct?

A Yes, I believe so.

Q Now, also on this application on the left-hand margin there is a date September 28, 1964. Can you tell us to the best of your recollection what happened on that date?

A September 28, 1964?

Q Yes.

A I went back to Fleetwood after the strike and asked if they were doing any rehiring.

Q Keep your voice up a little bit.

A I went back to Fleetwood after the strike and asked if they were doing any rehiring yet.

Q Who did you talk to at this time?

A Robert Radcliffe.

Q Was anyone else present during this conversation?

A Not that I recall.

Q What was Mr. Radcliffe's answer?

A He said no.

[fol. 34] Q Meaning no, they were not doing any hiring at that time?

A Yes.

MR. BERRY: You may cross-examine.

CROSS-EXAMINATION

Q (By. Mr. Scallon) Mr. Kluth, when you went back to the company after the strike you did not fill out any new complete application for work, is that correct?

A No, sir.

Q They just entered the dates on which you had been in the office to reapply, is that correct?

A Yes, sir.

* * * *

[fol. 37]

* * * *

TRIAL EXAMINER: On the record.

MR. SCALLON: Mr. Examiner, Counsel for the General Counsel and I have a stipulation which we are prepared to enter into at this time—actually two stipulations:

First of all, it is stipulated that there is no issue in this case as to actual discrimination against these employees aside from the issue whether the employees had been replaced prior to their reapplication for employment.

I am not sure I made myself entirely clear. That is the first stipulation. In other words, there is no claim that there was in fact discrimination against these employees as regards new hires unless they had been replaced.

MR. BERRY: As to that I will stipulate.

Mr. Davis, Mr. David Davis, who is an alleged 8(a)(3), [fol. 38] has not appeared here today. Counsel for the General Counsel is willing to stipulate that during Mr. Davis's employment he was employed as a painter in the cabinet shop at Fleetwood.

TRIAL EXAMINER: As a painter?

MR. BERRY: In the occupation of painter in the cabinet shop.

* * * *

[fol. 39]

* * * *

LONNIE DEAN PAINTER

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.

A Lonnie Dean Painter, 3784 Pacific Street, Riverside, California.

Q Have you ever been employed by Fleetwood Trailer?

A Yes.

Q Whendid you last work for Fleetwood? What month did you last work for Fleetwood?

A I imagine it was in January.

Q What was your last job while you worked for Fleetwood?

A The finishing department. I was the ceiling man.

Q When you worked on ceilings describe what your job was.

A We washed the ceilings down and repaired the holes and painted them.

Q What tools did you use while you worked repairing ceilings?

A A putty knife, hammer, and screwdriver, sponges, and paintbrush, and spatula.

[fol. 40] Q Before the strike in August did you have another job with Fleetwood?

A Yes, I did.

Q What job was that?

A I worked in the finishing department putting on windows and doors.

Q What tools did you use in putting on windows and doors?

A Hammer, screwdriver, air drill, and air screwdriver.

Q Is that an air screwdriver, did you say?

A Yes.

Q Can you describe how you went about putting in the doors and windows in the finishing department?

A First we would take the windows and line them with a line of putty and place them in the opening and screw them in—certain windows we had to measure and make sure they were in line.

Q While you were working in the finishing department did you do anything else inside the trailers at any time?

A Yes, I did. I put light fixtures up and I laid carpets a couple times, and put the molding on the walls and put the cornices up over the windows and the screens and put handles on drawers and doorknobs sometimes. I think that is about it.

Q What tools did yu use doing those particular jobs?

A Hammer, screwdriver, pliers.

* * * * *

[fol. 43]

* * * * *

Q After you made this original offer to return to work in August right after the strike did you again go to Fleetwood to see if there was any work?

A Yes, I did.

Q When was the first time?

A About a couple weeks after.

Q Who did you see at this time?

A Bob Radcliffe.

Q Where did the meeting take place?

A In his office.

Q Was anyone else present?

A Yes.

Q Who was that?

A Wally Rogers and—I forget the other fellow's name —Dave something.

[fol. 44] Q What was said at this time?

A We asked could we have our jobs back, and he told us there was no openings and to try again in a couple months.

Q Was anything else said?

A Not that I recall.

Q Did you go down after this first time again to see if there was any employment?

A Yes.

Q When was the next time?

A A couple weeks after that.

Q Who did you see at this time?

A Bob Radcliffe.

Q Was anyone else present?

A I don't think so.

Q Where did the meeting take place?

A In the front office.

Q Can you tell us what was said at this time?

A I asked if there was any job openings, and he said —he told me I was having fun out on the strike, and so just wait a while and he would call me a couple months, or whenever he had time.

Q Was anything else said?

A No.

Q Did you again go down to Fleetwood after this?
A Yes.
[fol. 45] Q About how long after this second time?
A A couple weeks.
Q Who did you see at this time?
A Bob Radcliffe.
Q Where did the meeting take place?
A Out in front of the building.
Q Was anyone else present?
A I don't think so.
Q What was said at this time?
A I just asked if I could have a job back, and he said no.
Q Did you ask him if there was any work, or if you could have your job?
A I asked him was there any work, and he said no, and that he would call me when there was.
Q That he would call you when there was?
A Yes.

* * * *

CROSS-EXAMINATION

Q (By Mr. Scallon) Mr. Painter, you started work on July 16th, is that right?
A Yes, I believe so.
Q And the date of the strike was August 6th?
A Yes.
Q So you had actually worked about three weeks prior
[fol. 46] to the strike, is that correct?
A Yes.
Q And you worked only in the finishing department during that time?
A Yes.
Q That was the finishing department in ceilings?
A No. This was inside the building.
Q Is this when you were putting on the windows and doors?
A Yes.
Q And that was your sole job during that time, putting on windows and doors?
A Yes.

* * * *

DAVID DAVIS

was called as a witness by and on behalf of the General Counel and, having been first duly sworn, was examined and testified as follows:

MR. BERRY: I will try not to go into anything we [fol. 47] stipulated to before as to Mr. Davis.

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.
A David Davis, 2450 Webster Avenue, Riverside, California.
Q Have you ever been employed by Fleetwood Trailer?
A Yes.
Q When did your employment with Fleetwood cease?
A The first of February.
Q 1964?
A 1965.
Q When did you originally start working for Fleetwood?
A It was in, I believe, the last of April.
Q Now, your last job with Fleetwood was what?
A Assistant saw man.
Q As assistant saw man what were your duties?
A Sawing and stacking wood.
Q Excuse me?
A Stacking wood, delivering it, and sawing different sizes.
Q Did you operate the saw yourself?
A Yes, I did.
Q Approximately how long did you assist working on the saw?
A Oh, approximately three months, I would say.
Q And before the strike you were a spray painter?
A Yes.
[fol. 48] Q Did you at any time help in the cabinet shop?
A Yes, I did.
Q What did you do in the cabinet shop?
A Oh, I helped build wardrobes and painted by brush and sanded by hand sander.

Q When you helped build wardrobes what tools did you use?

A Mostly a staple gun.

Q Can you describe how you went about assembling a wardrobe?

A We lay out the wood we need and staples and stuff, and glue.

Q Did you use a jig at this time?

A No.

* * * *

[fol. 49]

* * * *

Q After you made your original offer to return to work after the strike did you then go to Fleetwood to see if there was any employment?

A Yes.

Q Approximately when was this?

A Oh, I would say two or three weeks after the strike.

Q Was this the only time you were down there?

A No.

Q The first time you went down there who did you see?

A A man in the front office there. He isn't there any [fol. 50] more.

Q Do you recall his name?

A No, I don't. I think it is Roy, or something like that.

Q Do you know what he did at the plant? Do you know what job he held at the plant?

A No.

Q How long did this conversation with this gentleman take?

A Five or ten minutes.

Q What was said during the conversation?

A I asked him if they had any more job openings that I could do, and if I could get my old job back or something, or put me on anything that was open, and he said no, that I had to wait for an opening.

Q Try and keep your voice up a slight bit.

A O.K.

Q When was the next time you went down to Fleetwood to see if there was any work?

A About two weeks afterwards.
Q Who did you see at this time?
A Bob Radcliffe.
Q Where did you see Mr. Radcliffe?
A In front of the plant there.
Q Was anyone else present at the time?
A No.
Q About how long did the conversation last?
[fol. 51] A Maybe five minutes.
Q What was said at this time?
A I asked him the same thing, if he needed—had any openings yet, and he asked me had I renewed by application and brought it up to date, and I told him no, and he told me to go in the front office and bring it up to date.
So I did, and he said he would call me when he needed me after that.
Q Who told you that?
A The man in the front office.
Q The same person?
A Yes.
Q Did you go down to Fleetwood after this?
A Yes, I believe I did.
Q Do you recall about how long it would be after this second time?
A Maybe a week, I would say.
Q Who did you see this time?
A The same man in the front office.
Q Did you have approximately the same conversation?
A Yes.

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[fol. 52]

* * * *

MARY IMOGENE NEVINS

was called as a witness by and on behalf of the General Counsel, and having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.
A Mary Imogene Nevins, 1650 LeConte Drive, Riverside.

Q Where do you work, Mrs. Nevins?
A Fleetwood Trailers.
Q When did you originally start work for Fleetwood?
A November 4, 1963.
Q What is your present job at Fleetwood?
A I am in the cabinet shop assembling light balances and shelves and linen closet sides.

* * * *

[fol. 53]

* * * *

Q (By Mr. Berry) Now, at the present job what tools do you use?
A Staple guns, three, hammer, an awl nail set, and putty knife, and pair of dikes, and a tape line.
Q Describe how you go about doing your present job.
A The wood is cut to size and we lay it out and staple the frame together and place the "V" groove or quarter-inch plywood, whatever we are building, and after we staple it we glue it and then place the wood on the frame that we build and staple it together and finish it.
Q How long have you been doing this job?
A Approximately three weeks.
Q What job did you do before this?
A Pardon me? Since I came back?
Q Yes, since you came back to work after the strike, but when you were assembling light balances and shelves.
A I was building frames.
Q Any kind of particular type frames?
A Vanity frames, wardrobe facings, and back frames for these, on all of which we used jigs.
Q You used jigs for all those jobs?
A Yes.
Q What tools did you use while making those frames?
A Staple guns and occasionally a hammer.
[fol. 54] Q Keep your voice up slightly.
About how long did you do that job?
A Four weeks, approximately.
Q Can you describe how you went about doing that job?
A The gentleman that was working with me, whose name was Jim—I do not know his last name—he placed

the jig on the table for me, because it was too heavy, the wood was cut to size and I got the wood and placed it in the jig and stapled it together.

Q What job did you have before you went on strike?

A Squawking. Finish work. Detail work.

Q Can you describe what squawking or finishing is?

A Puttying, touching up paint, sweeping out the trailer, running the damp mop, and wiping down the walls for dust, and detail.

Q What tools did you use during that time?

A Hammer, nail set, and awl, a pair of dikes, a screwdriver, a tape line. Approximately the same tools I used at the other jobs.

Q Approximately how long were you a squawker?

A Between nine and ten months.

* * * *

[fol. 56]

* * * *

MR. BERRY: I mark as General Counsel's Exhibit 9 for identification an application for employment by Mary I. Nevins dated 8-19-64, 9-28-64, and 10-21-64.

(The document above referred to was marked General Counsel's Exhibit No. 9 for identification.)

MR. SCALLON: No objection.

OFFER IN EVIDENCE

MR. BERRY: I offer General Counsel's Exhibit 9 into evidence.

TRIAL EXAMINER: General Counsel's Exhibit 9 is received.

[fol. 57] (The document above referred to, heretofore marked General Counsel's Exhibit No. 9, was received in evidence.)

Q (By Mr. Berry) After you made your original offer to return to work after the strike in August, 1964, did you again go down to Fleetwood Trailer to see if there was any work?

A After August?

Q After August.

A Yes, I did.

Q Approximately how many times did you go down there?

A I phoned the middle of September and spoke with Bob Radcliffe. I was down the last of September, and the last of October I went to his office.

MR. BERRY: May the record show that on top of General Counsel's Exhibit No. 9, next to the dates September 29, 1964, and October 21, 1964, there are the notations "Came in," and next to the dates September 7, 1964, and September 26, 1964, the notation "Called."

Q (By Mr. Berry) Now, when you called on September 7, 1964, who did you speak to?

A bob Radcliffe.

Q Had you spoken to Mr. Radcliffe over the phone at previous times?

A Yes, I had when I was ill, calling in.

[fol. 58] Q Did you recognize his voice?

A Yes.

Q Could you please tell us what was said during this phone conversation?

A I just asked him if he had any openings for us to come back to work, and he said no, it depended on the amount of production and the amount of people that left the company.

Q Now, the next communication, according to the application, appears to be September 26, 1964, and you again called. Can you please tell us who you spoke to at that time?

A Bob Radcliffe.

Q What was said during this phone conservation?

A I told him I had applied for unemployment and that I could not continue on unemployment without searching for other work, and that I did not want to change jobs and I would like to come back to work at Fleetwood.

Q What did Mr. Radcliffe say?

A He said they had none.

Q On September 28, 1964, when you went into the plant who did you see at that time?

A Bob Radcliffe.

Q Where did this conversation take place?

A In his office. At that time he looked up my application, which I believe was in the front office.

Q Was anyone else present during this conversation?

[fol. 59] A Yes.

Q Do you remember who it was?

A I don't know. It was the gentleman in the front office.

Q Now, tell us what was said at this interview.

A I just asked him if he had any job openings, and he said none. And I asked him how things were going, and just mutual conversation.

Q Was the conference you had with him on October 21, 1964, similar to the others?

A Yes.

Q With the exception of these four dates, had you ever —was there any other time you went down to Fleetwood, or called to see if there were any openings?

A I went down the 21st of October.

MR. BERRY: You may cross-examine.

CROSS-EXAMINATION

Q (By Mr. Scallon) Mrs. Nevins, I show you General Counsel's Exhibit 9. This is the application which you filed on August 19, 1964, is this correct?

A I assume so.

Q The date is your handwriting, isn't it?

A I could not say definitely it is my handwriting. Excuse me. I filled out three applications. I filled out the original, I filled out one the day I went back after the strike, and also filled out one the day I returned to work.

[fol. 60] Q This one, in all likelihood, then, is the one you filled out after you returned after the strike?

A Yes.

Q Did you make the entry about halfway down the page where it says "Kind of Work Desired—Squawk"?

A No.

Q Isn't that your handwriting?

A No. I filled out my name and address and phone number, and my mother-in-law's phone number, and to my knowledge that is all I recall filling out.

MR. SCALLON: All right. Thank you.
No further questions.
MR. BERRY: No questions.
TRIAL EXAMINER: That is all, Mrs. Nevins.

(Witness excused.)

MR. SCALLON: I would like to recall Mr. Fuller for just one question.

Whereupon,

JAMES ERVING FULLER

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

TRIAL EXAMINER: Mr. Fuller, you were earlier sworn, and you are still under oath.
MR. SCALLON: May I have General Counsel's Exhibit 3?

[fol. 61]

CROSS-EXAMINATION (Continued)

Q (By Mr. Scallon) Mr. Fuller, I show you General Counsel's Exhibit No. 3, which is an application for employment dated the 19th of August, 1964. Is that the application which you executed?
A Yes, sir.
Q On the line about one-third down where it says "Kind of Work Desired," it has the letters "CA." Did you insert those letters?
A No, sir.
Q You did not?
A No.
Q Do you know, to your knowledge, what the letters "CA" commonly stand for?
A I assume it was cabinet assembly.

* * * *

[fol. 63]

* * * *

WILLIAM W. WEIDE

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Scallon) State your name and address, please.

A William W. Weide, 3196 Myers Street, Riverside, California.

Q What is your position with Fleetwood Trailer Co., Inc.?

A Administrative vice-president.

Q Mr. Weide, were you the principal company representative in the negotiations which led up to the strike with the Carpenters' Union at the Fleetwood Trailer Company plant at Riverside?

A I was.

Q I direct your attention to the meeting held at the Federal Mediation and Conciliation Service Offices on August 18, 1964. Were you present at that meeting?

A I was.

Q Can you state who else was present?

A In representation for the company there was Mr. [fol. 64] Jerome C. Byrne, legal counsel, and Mr. Hugh Scallon, legal counsel for the company.

Representative for the union was Mr. Vern Rippetoe, Mr. Fiedler, Mr. Brooks.

And then there was the conciliator officer also.

Q May I suggest his name was Goodwin?

A Goodwin, that is right.

Q Mr. Weide, will you tell us what transpired at that meeting?

A Well, the meeting was called by the Conciliation Service to see if they could find a common ground for solution of our negotiations that had broken down at that particular point.

Q How long had the strike been on at that time?

A I believe, if I recollect right, it was eight days. August 10th, and this happened to be August 18th. So it should have been eight days at that time, as I believe the record will show.

* * * *

[fol. 65] At that particular point he asked us if the strike were ended how would we suggest re-employing the people. At that time we explained to him that during the process of time from the time of the strike until the 18th, that because of reduction in personnel, and because of reduction in orders that were to be placed on materials, and other things, that we could not see our way clear to completely revert back to our old production capacity, which I believe was somewhere in excess of 20 units a week at that time.

[fol. 66] During the strike we had reverted back to approximately ten units a week.

However, we did tell him that, although we would not agree to preferential hiring list, and we emphasized this several times, that we would not agree to a preferential hiring list, that we would be willing to allow the employees to come in and register with the office and that we would give them due consideration, but that we would not limit our hiring in case we did increase production, we would not limit our hiring to this group in particular, but that we would not discriminate against this group as a group.

Q Did there come a time when the conciliator brought the union representatives back into the room?

A Yes, he did bring the union representatives back into the room, at which time the union representatives indicated to us in that room that they were ready to accept the terms of the negotiations of the contract, and they would immediately proceed to call off the strike.

Q Was there a discussion in the presence of the union representatives of the status of the strikers?

A Yes. This same discussion that took place about the nonpreferential hire list, more or less just the facts that I just stated, were again repeated in front of the union representatives.

[fol. 67] Q. Did the union representatives assent to these settlement terms?

A They raised no objection whatsoever.

Q The contract was ultimately signed, was it not?

A The contract was ultimately signed some time later.

Q Did the union have its people come in and sign an employment request list?

A Yes, they did.

Q Was the fact of the materially reduced production discussed at this meeting with the union representatives?

A Yes, it was.

Q Tell us about it.

A I need a clarification. Which meeting are you referring to now?

Q The one at the Federal Mediation and Conciliation Service.

A Yes. It was discussed in connection with the position we were in at that time as not being able to hire back anybody at that time. I don't recall the exact time, but it was a period of some weeks before we had actually hired anybody back immediately after that particular date because of the production capacities and what have you.

I am not sure I answered the question.

Q What were the terms of this request for hire? How was it to be administered, this request for hire list?

[fol. 68] A Employees would come in and register their names and request to be hired, and to the extent that their names remained on this list—this registered list—they would be contacted some time in a period of 30 days.

However, it was stipulated at this meeting that if they did not in fact come in in a period of 30 days they would disqualify themselves to the extent we wouldn't consider them any longer interested.

We also pointed out to the union representatives at that time to please be careful and inform the employees to—at the end of the 30 days—to keep track of this 30 days' period and come back and re-register again to keep them on this list to show they were still interested in going back to work.

Q What happened at the end of the expiration of the first 30-day period?

A Some time between the expiration of the first 30-day period and some time after that the union representa-

tives and myself met in my offices to execute the contract, at which time I informed them that these employees had not in fact come back in and reaffirmed their desire to go back to work, and I urged them again, although it was past the 30 days, I would wait until the first of the following month before I would drop their names from this list showing they were interested in going back to work.

[fol. 69] In fact, we had to notify the union that some of the employees did not come back in and register.

Q Did the union notify the employees?

A The union notified the employees. We gave them the names of the employees who had not come back and re-registered, and they notified these employees, and some of them did not come back immediately.

We called the union and they called them again, and they had to give them second notice, and some of them subsequently did come back and re-register, and some of them have never come back and re-registered.

I think that is the correct sequence.

MR. SCALLON: I have no further questions.

CROSS-EXAMINATION

Q (By Mr. Berry) Let me see, Mr. Weide, if I have the understanding of your version of this strike settlement agreement correct.

You state it was agreed between the union and Fleetwood at the time that a nonpreferential hiring list would be set up, is that correct?

A Yes.

Q And that you would have the right to hire off the list as well as hire on the list as long as you did not discriminate against the strikers as a whole?

A Yes. I guess I answered that.

[fol. 70] Q Do you understand my question?

A Yes, but I am not sure as you put the question that that is the exact words as I answered it. We didn't agree, as you stated in your question, if I might clarify that, we did not agree that we would hire off the list as well as hiring others.

I think we agreed that it would not be mandatory to hire off the list. We could hire others. We were able to hire others too.

* * * *

[fol. 71]

* * * * *

Q You stated because of your decrease in production, and this was one of the factors which you took into consideration to set up a nonpreferential hiring list, was your decrease in production, is that correct?

A Yes.

Q Is it not true within a couple months after the strike ended you did increase production again from ten to approximately fifteen trailers a week?

A I am not sure. I can't testify the exact date they were increased.

Q Would it have been approximately two months?

A I would say it sounds reasonable. I can't testify to the exact date.

Q Did you not at some subsequent time after increasing it back to fifteen trailers a week increase it back to your original production of approximately twenty [fol. 72] trailers per week?

A We have since increased it to twenty trailers a week.

Q Do you have any idea when approximately you did increase it back to twenty trailers a week?

A The best my recollection allows, it was some time in January.

Q Now, while you were discussing terms of the strike settlement in the office of Commissioner Goodwin was it your idea at that time to keep production at about ten trailers a week, or was it your notion at that time to go back to the original twenty trailers per week, although you could not tell exactly at that time when it would be?

A We did not know at that time how fast we could get back to twenty trailers a week.

Q But it was your intention to go back to twenty a week at some future time?

A Yes.

Q Would it be a correct statement that the reason you did not know exactly when you would go back to

fifteen or twenty trailers a week was because you were not sure whether you could train employees quickly enough to get out the quality trailer you wanted to put out?

A That is not completely right. There were two factors involved. One, as you mentioned, speed as it relates to quality of product; and the second one was the [fol. 73] fact of our source of supply and its time factor to our plant, since we had taken some action to reduce standing orders with various vendors on raw materials, not knowing how long the strike might persist.

Q How long would it normally take you to get something from a supplier if you ordered it today?

A On some supplies you can get it the same day, and some supplies you can get it in several days, and other supplies can take up to 30 days.

Some items we buy on a 30-day supply basis, and others on a week-to-week or bimonthly basis.

Q Now, when these employees came in the second time to register, this would be some time after the original 30-day period had expired and they would put their names back on the list to show their availability, and this new list then was kept in the same way as the old list, and these were the strikers who were to be called back if strikers were to be called back at all?

A That is my understanding, that they were.

I would like also, Mr. Berry, if it is in order, to again requalify that to state that it was by our urging that they were asked to re-register, because some of them, by the agreement, had disqualified themselves by not coming back in.

* * * *

[fol. 74]

* * * *

Q (By Mr. Berry) By their not coming in in the exact 30-day period did you disqualify those strikers who did come in after this 30-days period?

A We considered them disqualified until they did come back in and re-register, and then we requalified them.

MR. BERRY: No further questions.

REDIRECT EXAMINATION

Q (By Mr. Scallon) One point of clarification. At the expiration of the first period between the time that first period expired and the time they came in did you consider them as disqualified for employment during that period?

A We considered the fact they disqualified themselves [fol. 75] by not—I don't like to use the word "disqualified." We considered the fact they had disqualified themselves because they no longer showed an interest, because that was part of the consideration of the whole thing, that by coming in to re-register they showed they were interested in coming back to work.

* * * *

TRIAL EXAMINER: And your production then of 20 trailers a week, had that continued to be your production up until the strike was called?

A We were at a 20-trailers-a-week rate. In fact, I don't think—we use these terms loosely. May I explain a moment?

We can be on a schedule of 20 a week, but at the same time we might not be accomplishing the schedule.

I am not sure—I haven't studied the records that recently, but we are on a rate of 20 a week, but whether we were accomplishing that rate of 20 a week when the strike occurred, I can't tell you.

TRIAL EXAMINER: I think this is the sense of your [fol. 76] testimony: That it was the happening of the strike which caused you to change your orders for materials and supplies, and to abandon the idea of making 20 trailers a week.

THE WITNESS: That's right.

TRIAL EXAMINER: Subsequent to the beginning of the strike and at the time that you met at the Mediation Office and reached agreement with the union on the conditions under which the strike would be ended, had you hired any new people in the plant?

THE WITNESS: Yes, sir, we had, during the strike period.

* * * *

[fol. 77]

* * * *

CECIL B. CHAPMAN

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Scallon) Will you state your name and address, please.

A Cecil B. Chapman, 4121 Glenwood Drive, Riverside, California.

Q What is your position at the Fleetwood Trailer Company?

A Plant manager.

Q Will you explain what the position of plant manager means in your organization?

A Well, I am responsible for not only the production department activities, but sales, purchasing, accounting, and in a sense the overall operation.

Q Mr. Chapman, are you familiar with the various jobs and classifications in the production department of your operation?

A Yes, I am. I am an ex-production manager.

Q What is the function of production manager?

A Directly in charge of the production department.

Q During the period August 1964 through December 1964 were you involved in the hiring process for [fol. 78] production employees of Fleetwood?

A Primarily in an advisory capacity.

Q With whom did you consult?

A My production manager.

Q Who were the production managers?

A The production manager at that time was Bob Radcliffe.

Q And subsequently there was a new production manager?

A Yes.

Q What is his name?

A William Gaines.

* * * *

[fol. 79]

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Q Did you consult with the production manager concerning the filling of the position for which the replacement employees were hired?

A This was discussed, yes.

Q Are you familiar with the employment records of the six complaining employees in this case?

A Yes. I pretty well made it my business to become familiar with all the applications at that time.

Q Did you discuss the complaining employees' records with the production manager?

A Yes, sir.

Q When these six positions were opened did you consider the complaining employees for possibly calling in to fill these positions?

A Yes, I believe they were considered.

Q On what grounds was the decision made not to call these employees for these particular positions?

A Well, in each specific instance there were different grounds. It depended upon our rate of production, what position was open, and who was available to fill it.

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[fol. 80]

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Q Now, I call your attention to the position to be filled on October 12, 1964 in the flooring department. Will you describe the activities of an employee employed in this classification.

A Well, the flooring department may have four to seven men, depending on the rate of production we are in. They build a complete floor.

This floor is ten feet wide, and anywhere from 40 to 48 feet long. It is constructed out of two by four framing joined together in 40 or 50 feet length. This framing has to be handled from one area and manhandled over to the jig after it is assembled together.

The main flooring itself consists of 5/8 plywood four feet wide by ten feet long, and quite heavy.

This particular job uses heavy tools. They do use staple guns, routers and hammers, but in this particular

department the staple gun, routers and hammers, generally speaking, all the tools they use are of the heavier capacity or heavier duty because they are dealing with large and heavy materials, and there is quite a bit of manhandling and heavy weight, climbing up and down from floor level to the level of the trailer, which is approximately 30 inches from the floor, lifting appliances on the trailer from ground level to floor level and so it [fol. 81] takes a healthy, fairly strong employee in that department.

They use, for example, 20-ounce hammers instead of 13-ounce hammers.

Q Could a woman perform this work?

A No.

Q Could a man of age 55 perform this type work?

A I wouldn't consider it advisable to try it, because he is climbing over the jig and stepping over and lifting and climbing up and down, and I wouldn't advise it.

Q You were present this morning and witnessed the demonstration concerning the vision of Mr. Kluth, is that right?

A Yes, sir.

Q And you have observed Mr. Kluth working in the shop itself?

A Yes, I have.

Q In your opinion could a man with his visual limitations perform the work required on this job?

A No, because in many of the job functions it requires coordination between two or more people at the same time.

Q He would have to be able to see these things?

A Yes. And not only see what you are doing yourself, but see what the other man is doing.

Q I call your attention to the job opening October 13, 1964, for a finisher. Will you describe what that job involved.

[fol. 82] A Oh, it is in the finishing department, and it involves installing windows, sliding glass doors, carpet, electrical fixtures, hardware, setting of the overstuffed furniture in the unit, dinette sets, and that is about the extent of that department.

Q Could a woman perform this work?

A Possibly some functions of it, but not all of it.

Q Could an older man perform this type work?

A He could probably 80 per cent of it. Lifting sliding glass doors and furniture and rolls of carpet, I would not prefer to have an older man in that particular department, primarily because everybody within that department, every man in the department, must be able to perform all the operations handled in that department.

Q Could Mr. Kluth with his visual limitations perform that job?

A I seriously doubt it. They are working in a darkened unit in that it has no electricity or lights in the unit while they are working, that is, until the final stages of the operation when the electrical fixtures are installed. So the trailer is darkened and there is heavy lifting necessary in some functions of that particular department.

Q Now, I would like to ask you about the job opening for October 16, 1964, which was for a cabinet setter. Would you describe what that job involves.

[fol. 83] A Well, it involves the cabinet setters themselves going over to the cabinet shop and picking up and carrying by hand all the furniture necessary to go inside one of our units. This includes interior walls which may be seven feet tall and seven to eight feet long, complete the wardrobe, complete the galley consisting of a rather large piece of furniture with the kitchen sink already installed.

There is quite a bit of heavy lifting, and quite a bit of work at height. All this furniture has to be carried from ground level to the level of the trailer and installed in the trailer. This sometimes involves climbing up and around and standing on other pieces of furniture to reach heights, getting back under tight spots to secure or screw parts down to the main body of the trailer. That pretty well is the extent of it.

Q Would you say that Nevins, Malzahn, or Kluth were capable of performing these functions?

A No.

Q Did you in the process of passing upon who would be employed for these various positions have occasion to inspect the work records of the employees?

A Yes, sir, I did.

Q Were there any of them that you felt were disqualified from the positions on the basis of their prior work record?

A Offhand I would say no, except possibly one exception.

[fol. 84] Q What exception was that?

A James Fuller.

Q I call your attention to—

MR. SCALLON: Off the record a moment.

TRIAL EXAMINER: Off the record.

(Discussion off the record.)

TRIAL EXAMINER: On the record.

Q (By Mr. Scallon) I show you General Counsel's Exhibit 2, which is the employment record of James Ervin Fuller. Will you tell us from that form what aspects of it you considered unsatisfactory from an employment record point of view?

A His attendance record, actually, prior to the strike. There is one notation with his application that is not here which has a bearing on it. He and our assistant production manager got in a small hassle. I don't recall the exact date, but I have it there on the report.

It seems there had been a fire outside our building across the street in a garage across the street, and, naturally, this caused commotion throughout the plant and some of our employees started drifting away from their work areas and started toward the front of the building to inspect the fire.

During this particular time myself and our sales manager went across the street and in the meantime our [fol. 85] accountant called the fire department, and the salesman and myself went across the street to see what was going on, or see if there was any possibility of spreading or damaging anything in the area, or if there was anything we could do.

In the meantime some of the employees in the plant began to leave their work stations and drift toward the front of the plant.

Mr. Radcliffe, the production manager, went forward and closed the front big doors, and those within speaking

distance, he asked them to go back to their work tables and continue working.

James Fuller was one of these men who left his table and started toward the front, and he was approached by our assistant production manager, Bill Gaines, and Bill asked him to go back to his work station, and I forget the exact wording—I don't recall the exact wording that took place—but there were some harsh words exchanged between he and our production manager to the effect that James Fuller asked if there were any of the employees' cars on fire out there, and to the effect that the assistant production manager replied, "No," if there were we would have help and we would get it corrected.

James Fuller replied in a somewhat heated tone to the effect, "Well, there better not be any cars out there."

And the assistant production manager asked him to go [fol. 86] back to his work table.

A few minutes later James Fuller dropped his apron on the table and started walking towards the front, and I don't know whether he went to the assistant production manager or the assistant production manager approached him and asked him where he was going.

And James Fuller said he had a headache. I think he was directed by the assistant production manager to the production manager, Bob Radcliffe, and James Fuller said he had a headache and he wanted to go home. This was within 15 minutes after the previous occurrence.

Bob Radcliffe mentioned to James Fuller that his attendance record had been rather poor the last week or so; that if he felt he should go home because of an illness or something, he should possibly bring a doctor's slip.

He asked James Fuller if he was going to the doctor, and James Fuller said, "No."

Bob Radcliffe, as I recall, said in effect, "You have had some absences recently. If it is necessary for you to take off, I would recommend that you go to the doctor and bring in a doctor's slip." I believe it was Monday morning —I believe this was an occurrence on Friday.

As it turned out James Fuller did come back to work Monday morning and brought a slip from the doctor stating he had been examined the following Saturday.

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[fol. 90]

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Q (By Mr. Scallon) To review a moment, Mr. Chapman, was it your testimony that Mr. Fuller was the only one of the complaining employees whom you considered disqualified because of his work record?

A Well, yes, because of—well, not the only one because of his work record, but primarily because of this specific incident there where it bordered on insubordination.

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[fol. 91]

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JEROME C. BYRNE

was called as a witness by and on behalf of the Respondent and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Scallon) State your name and address.

A Jerome C. Byrne, B-y-r-n-e, 9955 Young Drive, Beverly Hills, California.

Q Mr. Byrne, are you a member of the law firm of Gibson, Dunn & Crutcher?

A Yes.

Q And that is the same law firm of which I am associated?

A Yes, sir.

Q Now, in the period of approximately March through December, 1964, were you counsel for the Fleetwood Trailer Company in negotiations concerning their Riverside plant?

[fol. 92] A. Yes, sir. I have been counsel for them in labor relations matters since they opened the plant in Riverside, and followed through until very recently when I took a three-month leave of absence from my practice for a matter relating to the University of California.

Q Now, I direct your attention to a meeting held at the Federal Mediation and Conciliation Services Offices

on August 18, 1964. Were you present at that meeting?

A Yes. I represented the company at that meeting.

* * * *

Q Would you recount to us, as you remember it, the discussions leading up to the agreement to terminate the strike at the Riverside plant?

A Well, the strike had progressed, as I recall now, for a two weeks period. The company had engaged in a [fol. 93] program of hiring replacements. As I recall, there were about half of the people either who did not go out on strike or within a few days crossed the picket line to return to work, and the company was in the process of hiring additional replacements.

The conciliator requested the meeting, which, as I said, I attended representing the company.

The conciliator, I think, separated the parties and talked with us first. By "us" I mean the company representatives.

The main issue that he directed his attention to was the question of union security, the position of the company throughout the negotiations having been that there would be no union security or checkoff of dues.

In the prior conversations at this meeting we repeated that position and said that there was no change, and I made it quite clear that there was no possibility of change in position; that I thought it would be a waste of time for him to pursue it further; that the company takes a strong view that it should not get involved in these matters, but that it should be left to the employees to choose themselves.

He suggested that, as an alternative, some method be worked out whereby the company would indicate by letter to the employees that union membership was available, and not to counteract any patent discouraging of joining. [fol. 94] We discussed this aspect. I think he mentioned he had done this in some other situation he had had, the conciliator, that is, and we rejected it.

I don't recall if we discussed any other possible changes in the contract at all except for this union security—by contract I mean in the proposal that had been submitted to the union prior to the strike and which had been rejected.

There were at that time two or three issues, but union security was the overpowering issue.

Mr. Goodwin left, as I recall, and went with the union people. I don't remember now whether he came back alone, and then the union people came back, or whether he came back alone and talked to us briefly and then they joined in, but at any rate my best recollection is that he came back and said the union was accepting the deal.

Then we started talking about a preferential hiring list. This may have been when the union people were present, and I think it was. I think it was a matter of accepting the deal without union securtiy that he informed us alone, and then he brought the union people in and then I think the question of preferential hiring list was raised.

At that time we stated it was our position there would be no preferential hiring list; that we would not discriminate in any way, but we wanted to be free to hire good [fol. 95] people who made themselves available.

We also pointed out at that time that we really were not in the process at the moment of hiring any more; that we had reached a point where we could not right at that moment handle any returning strikers, or at that moment any other new employees.

The union was rather unhappy about this position of not having a preferential hiring list. I said that what we would do would be to maintain a list of employees—striking employees—for a period of 30 days, and that when any vacancies occurred we would consult that list, but would also feel free to hire any other employees who we thought were better qualified than those on the list.

We put the condition that the employees had to come in and sign this list because we wanted to make sure that they had an individual interest in returning to work. And we said at the end of 30 days if they still were not reinstated or rehired, that they would have to come in and sign the list again so as to renew their interest in being considered for any opening that came up.

Q Was the condition concerning the status of the strikers, was this made clear to the union representatives?

A Well, we made the point that at this juncture we had a full complement of personnel, and that these strikers—it was a situation where the plant was in a [fol. 96] completely relaxed situation. This business was producing a certain number of trailers—I don't remember the numbers, but their supply of inventory trailers or mobile homes was such that they were lowering their production schedule anyway.

Am I answering the question?

Q Were the terms that this was not to be a preferential hiring list, was this fact made absolutely clear to the union?

A Yes, absolutely. They asked for a preferential hiring list, and we rejected it, and I came forward with this 30-day list and made it clear to the gentlemen there would be no preferences, but the list would be consulted whenever there was a vacancy, but we would be free to hire from the outside.

The conciliator understood it that way, and the resolution of the matter was we would go ahead and prepare the contract in accordance with the terms of the contract that was submitted to the union prior to the strike, which we proceeded to do, and over a course of a few weeks it was prepared and reviewed by the union and eventually some time later—I don't remember when—it was signed.

* * * *

CROSS-EXAMINATION

Q (By Mr. Berry) Mr. Byrne, let me see if I have your version of the strike settlement agreement correct. [fol. 97] You said it was agreed it was a nonpreferential hiring list that was to be set up.

A Yes.

Q And that you would maintain a list of employees for 30 days, and if and when vacancies occurred you would consult that list, but you would also feel free to hire off that list or away from it?

A Yes.

Q At the end of 30 days, if they were not rehired, they would have to come in and re-register again.

A Re-register to continue to show their interest. As a matter of fact, at the end of the 30 days—I didn't want to be unfair to these people, so in conversation with Mr. Weide I asked him to remined the union of the 30-day period so those who were interested would remember to come in and sign up, and I can't say whether he did or not.

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[fol. 98]

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CECIL B. CHAPMAN

was recalled as a witness and, having been previously duly sworn, was examined and testified further as follows:

DIRECT EXAMINATION (Continued)

Q (By Mr. Scallon) Mr. Chapman, did you prepare a schedule of the production of trailer units at my request?

A Yes, I did.

Q I show you a typewritten list. Is that the list you prepared?

A Yes.

MR. SCALLON: I would like to mark this list as Respondent's Exhibit 2 for identification.

[fol. 99]

• • • •

Q (By Mr. Scallon) Will you explain the figures—what this schedule consists of.

A The column on the left is week ending. For example, 7-5-64 at the top means the week ending 7-5-64, which is a Sunday.

The column on the right is the number of units produced each week. This schedule starts at 7-5-64, and beginning that week we had produced 15 units.

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[fol. 100]

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Q (By Mr. Scallon) All right. The week immediately preceding the strike, which would be—

A 8-2-64, we produced 18 units.

Q That was your actual production of units, is that right?

A This is the—

Q Let me ask you, what does that figure 18 represent?

A This represents the number of units that under our system has been "bought" by our sales manager, who is responsible for quality and accepting the unit from production as in a condition and up to our standards of quality, available for shipment to a dealer.

Q What was your programmed production for that week?

A Between 7-5-64 and—

Q No, for the week immediately preceding the strike.

A I believe it was 18.

Q That was your programmed production?

A Yes, preceding the strike.

Q Now, in the week of the strike what was your [fol. 101] actual production of trailers?

A Twelve.

* * * * *

Q What was your programmed production for that week?

A Twenty.

Q What was the reason for the reduction in units?

A Approximately 50 per cent of our employees walked out.

Q Subsequently did you establish a lower production rate for the plant?

A Yes, we did.

Q What was the production rate you established immediately subsequent to the strike?

A Ten a week. Two a day.

Q These were the programmed units?

A Yes.

Q Did you subsequently increase your programmed production of units?

[fol. 102] A Yes, we did. For the purposes of purchasing and getting reorganized we agreed that we should stay programmed ten units a week until we found out how things were going, but it was our intention to get back to full production as soon as possible.

Q When did you actually increase production again?

A The week following the strike we produced seven units.

Q I am speaking at the moment of your programmed production. Apparently, is this right, your actual production will just vary with quality control, whether it has been accepted or not, is that right?

A Yes, this is correct. We have two aspects of this, the number of units that come off the line may be different from the number of units bought by the sales department. It depends on their condition when they come off the line.

Q I am referring at the moment to the number of units coming off the line.

Immediately after the strike you scheduled for ten units a week, is that right?

A Yes.

Q When did you first increase that programmed schedule?

A Approximately two weeks later.

Q Will you note the date on that list.

A Yes.

Q What date did you increase your programmed units?

[fol. 103] A 8-23.

Q And what was the increase?

A Well, actually, it was to 12. It shows 14 here, but two of them were units that had been bought from prior production, possibly a week or two weeks before.

Q I think we are managing to confuse everything here. Let me start over from the word go.

Right after the strike how many units did you program?

A Ten. Two a day.

Q When did you first program 12 units?

A I believe our intention was—

Q No. When did you actually program? Did you say you would program for this week 12 units and hire in employees for 12 units?

A Approximately—you are talking about two different things. If we are going to program an increase in units we must hire employees a week or two prior.

Q When did you program more units? Let's stick to program.

A I think possibly it was three weeks later we intended to go from ten to twelve.

Q And subsequently did you increase that again?

A Yes.

Q To how many units?

A About 14.

[fol. 104] Q About when was that?

A Approximately the week ending October 11, 1964.

Q Subsequently did you increase it again?

A Yes. To 16, approximately two weeks later, 10-25-64.

Q And subsequently was it increased again?

A Eighteen, on 11-16-64.

Q And subsequently was it increased again?

A Nineteen units on 12-6-64.

Q And what is your production now?

A Well, we increased again to 20 units a week on 12-13-64.

• • • •

OFFER IN EVIDENCE

MR. SCALLON: Yes. I offer that exhibit into evidence as respondent's Exhibit 2.

TRIAL EXAMINER: Any objection?

MR. BERRY: No objection.

TRIAL EXAMINER: It is received.

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[fol. 105] CROSS-EXAMINATION

Q (By Mr. Berry) Mr. Chapman, going to Respondent's Exhibit 2, I want to make something clear in my mind, and something for the record.

This list does not show the actual production put out during the week, but shows the amount of trailers bought by your sales manager?

A Yes.

Q In other words, if 20 trailers were produced but only 19 were bought, you would have 19 down here instead of 20?

A Yes.

Q When you program for 16 trailers a week do you normally bill for 16 trailers a week?

A Yes.

Q And would you normally, when you program for ten, bill for ten?

A Yes.

A May I ask whether the numbers written in pen along the weeks correspond to the weeks when the increase in programming was?

A That is approximately, yes. It is very close.

Q Mr. Chapman, when you are looking to hire a finisher who installs the windows and handles and heavy materials and uses heavy tools, what are you looking for in his experience, or are you just looking for a strong man?

[fol. 106] A A willing worker.

Q Are there any previous work experiences that you are looking for?

A None in particular.

Q When you are looking for an employee you consider to be a willing worker, what do you look for?

A We would like him to be healthy, and would like him to be 19 to 25 years old. We would prefer that he had a good past record—employment record. Depending, if we have an opening in a particular department, there might be certain physical requirements we might be looking for.

For example, on the flooring department—

Q No. At this moment I am talking about the finishing department.

A The finishing department?

Q Yes.

A No particular physical requirement, except that he be healthy.

Q Would you consider David Davis healthy?

A Yes.

Q Between 19 and 25?

A Yes.

Q Have a good employment record?

A I would have to consult what information we have on our records. I don't know.

[fol. 107] Q And Lonnie Painter, would you consider him healthy?

A Not judging by his absenteeism.

Q And James Fuller, except for his absenteeism when he was sick?

A Yes.

Q And he is between 19 and 25, approximately?

A Right.

Q Now, when you are looking for an employee who has to lift heavy wood and big pieces of plywood and staples and other tools, I gather you are looking for a strong employee?

A Yes.

Q And this is your basic requirement?

A Yes, sir.

Q Besides being healthy and a willing worker and a good work record?

A A willing worker, yes, sir.

Q Now, was Lonnie Painter a finisher before the strike started?

A I believe he was, yes, sir.

Q This is General Counsel's Exhibit 7, Lonnie Painter. The first notation that I see on General Counsel's Exhibit 7 is that he was off 8-6-64 due to a strike.

A That is correct. He had been in our employ approximately three weeks.

Q So as of this time you did not have anything [fol. 108] against his work record, is that correct? Judging from General Counsel's Exhibit 7?

A Correct.

Q Now, to produce more trailers a day is it necessary to hire more employees?

A Normally, yes.

Q Well, could you produce 15 trailers a day with the same complement that you can produce 10 trailers a day?

A No. We need less men for 10 than we need for 15.

Q How many employees do you have now at Fleetwood?

A Now?

Q Yes, now.

A Approximately 108.

Q Do you recall how many employees you had on August 5th, which would be the day right before the strike commenced?

A 110.

Q And you are producing approximately the same production that you had just before the strike, you program 20 trailers a week?

A yes.

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[fol. 109]

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Q I turn your attention to the second paragraph on Page 3 of General Counsel's Exhibit 10 for identification and ask you to read the third sentence.

A "There were 71 employees as of the time the strike ended."

Q Thank you.

At this time do you think that would be a correct statement of the number of employees at the time the strike ended?

A Yes, sir.

Q How many extra employees do you need—how many extra employees would it take to produce 11 trailers than it would 10 trailers a week?

A I could give a better example between 10 and 15.

Q All right. How many would it take to produce be-

[fol. 110] tween 10 and 15?

A Approximately 50 people for 10 a week, and approximately 74 people for 15 a week. As you increase production the number of people that you add does not necessarily increase proportionately.

Q And for the production of 20 trailers you need from approximately 108 to 110 employes?

A This is what we have found so far.

Q Now, I show you Respondent's Exhibit 2, and it states on the week beginning October 25, 1964, you were programming for 16 trailers a week, is that correct?

A That's right.

Q You also state that when you hired employees and when you raised your program you hire employees approximately a week or two before time?

A Yes. It can vary, according to the amount of increase we are going to attempt.

Q Would it be a correct statement to say then when you hired the six employees listed in the General Counsel's stipulation that you were hiring them for the increase in production from 14 to 16 trailers a week?

A This I could not answer. They may have been hired as replacements and quits or terminations.

Q But it would take more employees to produce 16 trailers a week than it would to produce 14 trailers a week?

[fol. 111] A This is correct.

Q And with the exception of Eddie Latinsky, who was hired on October 8, the rest of the employees in that stipulation were hired after October 11 when you were producing 14, but before October 25 when you were producing 16 trailers, is that correct?

TRIAL EXAMINER: You are not asking him to vary the stipulation, are you?

MR. BERRY: No, not at all.

TRIAL EXAMINER: Well, the stipulation is in.

Q (By Mr. Berry) Now, you stated before, Mr. Chapman, that Mrs. Nevins, Mr. Malzahn, and Mr. Kluth you did not consider capable of performing the job of cabinet setter, is that correct?

A Yes.

Q You did not state that you did not consider either Mr. Painter, Davis, or Fuller as not physically capable of performing the job?

A I do not state that. That is correct.

Q And you did intend at all times to get production as quick as possible up to 20 trailers a week?

A Correct.

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[fol. 112]

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REDIRECT EXAMINATION

Q (By Mr. Scallon) Referring to the sentence you were asked to read previously, will you read that full sentence.

A "There were 17 employees —"

Q Excuse me. Seventeen?
A "71 employees." Excuse me.
"— as of the time the strike ended, and there are presently 74 employees."
Q What is the date of this statement?
A 19th of October.
Q So that on the 19th of October the net working force had increased by only three employees, is that correct, from the date of the end of the strike?
A That is correct.

• • • •

Q (By Mr. Scallon) For the purpose of those hypo-
[fol. 113] thetical figures which you postulated to Mr. Berry, concerning the number of people necessary to produce certain levels of trailers, would the increase in the number of employees necessary, would that vary with the skill and experience of the employees?
A It certainly would.
Q For example, if on a given date you had largely unskilled employees, subsequently it is entirely possible you would increase production without a necessity of increasing your number of employees as they increase their experience?
A This is the way it works.

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[fol. 114]

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ANDREW FIEDLER

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.
A Andrew Fiedler, 831 Twenty-ninth Street, San Bernardino, California.
Q By whom are you employed, Mr. Fiedler?
A I am employed by the Carpenters Local 1959.
Q In what capacity are you employed?

A I am the business representative and also the financial secretary.

Q Now, I direct your attention to the meeting between the union and Fleetwood which took place on August 18, 1964, in which you were present.

• • • •

Q (By Mr. Berry) What was said at the meeting concerning the strike settlement agreement, to the best of your knowledge?

A To the best of my knowledge, as far as that meet-
[fol. 115] ing was concerned, Commissioner Goodwin and our executive secretary, Vernon Rippetoe, had been doing the negotiating. I had been invited to some of those meetings, but the executive secretary had done most of the negotiating, and I had nothing to do with the negotiating.

I think I attended three meetings. I understood at that meeting that the union would accept the agreement, and there was a list supposed to be made up of the employees to go in and register on some kind of a list, after we had taken them off the picket line on August 18, 1964.

Q Do you recall anything said about whether it would be a nonpreferential or preferential list for hiring that would be set up?

A I just can't say, sir, exactly preferential or nonpreferential, or any other list. It was a list.

We were over there on account of Mr. Rippetoe going to San Francisco, and Mr. Brooks and I went over there. Ordinarily I wouldn't have been at that meeting.

We were told to go back and take the picket line off and notify the people that were on strike they would return there and register on a list. What kind of list, I have no recollection.

Q Was it your understanding that Fleetwood could hire off this list before they hired all the employees on this list?

A To the best of my knowledge, I wouldn't know.

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[fol. 116]

• • • •

Q (By Mr. Berry) Did you hear anything at this meeting, Mr. Fiedler, concerning whether or not Fleet-

wood could hire off the list before—could hire employees away from the list before they hired all the employees on the list?

A Could you say that again?

Q I am sorry. I will restate it.

Was anything said at the meeting as to whether Fleetwood could hire employees who were not on this list as well as employees who were on this list?

A Gee, I couldn't answer that. I don't recall.

• • • •

ALBERT BROOKS

was called as a witness by and on behalf of the General Counsel and, having been first duly sworn, was examined and testified as follows:

[fol. 117] DIRECT EXAMINATION

Q (By Mr. Berry) State your name and address.

A Albert Brooks.

Q By whom are you employed, Mr. Brooks?

A You want me to give my address first?

Q I am sorry.

A 3446 Russell Street, Riverside.

Q Is that San Bernardino?

A Riverside.

Q By whom are you employed, Mr. Brooks?

A District Council of Carpenters.

Q In what capacity?

A I am business representative and treasurer of District Council of Carpenters.

Q I direct your attention to the meeting of August 18, 1964. Were you present at this meeting?

A I was.

Q Will you please relate to us to the best of your recollection what was said at this meeting concerning the strike settement agreement.

A Well, we were all assembled, both the employer and the union, Mr. Goodwin, for discussion, and Mr. Goodwin called us into another room, and after some discussion he advised us to make settlement and I believe Mr. Goodwin

—I believe two trips back and forth, and then we were [fol. 118] all called in and reassembled.

Q Speak a little louder, please.

A O.K.

And it was stated that the union would accept the agreement, and that Mr. Fiedler and I, on our way home, would go by the plant and call off the picket line, which we did. And it was stated, as I understood it, that the employees would come in and sign a list, which they were told at a meeting that evening, and they would be put back to work as needed.

Q Was anything said concerning whether these strikers would be called back before Fleetwood hired employees who were not on that list?

A Well, I don't recall it.

Q Was anything said as to whether the list would be preferential or nonpreferential?

A That I can't say.

* * * *

[fol. 121]

* * * *

CECIL B. CHAPMAN

was recalled as a witness by and on behalf of the Respondent and, having been previously duly sworn, was examined and testified further as follows:

REDIRECT EXAMINATION (Continued)

Q (By Mr. Scallon) Mr. Chapman, at my request [fol. 122] did you determine the number of persons hired subsequent to the date of the strike, up to the date of the termination of the strike?

A Repeat the question.

Q Did you determine the number of persons hired during the strike?

A I can give approximate figures. We had approximately 107 or 108 on the payroll prior to the strike. Approximately 53 or 54 did not return to work as of the beginning of the strike.

At the end of the strike we had approximately 71 people on the payroll. We hired the difference there of probably 25 or 30 people.

• • • •

[fol. 123]

RECROSS-EXAMINATION

Q (By Mr. Berry) I have a letter which I will identify for the record for identification as General Counsel's Exhibit 11. It is a two-page document, the first page on the letterhead of Gibson, Dunn & Crutcher; the second page on Fleetwood Trailer Company.

The first page is signed by Hugh D. Scallon, and the second page by C. D. Chapman.

MR. SCALLON: That is the document we are willing to stipulate that that attached schedule to that letter does represent the employees hired during the strike.

MR. BERRY: That stipulation is received by General Counsel.

(The document above referred to was marked General Counsel's Exhibit No. 11 for identification.)

Q (By Mr. Berry) General Counsel's Exhibit 11 for identification lists 21 employees who were hired during the strike, and you stated, I believe, there were 53 employees. Is that your figure?

A As I recall, thereabouts.

Q So that leaves 32 positions that were not filled, is that correct?

TRIAL EXAMINER: That is a matter of arithmetic.

Q (By Mr. Berry) Now, can you state with any [fol. 124] definiteness which employees you hired during the strike replaced any individual that was on strike?

A No, sir, I couldn't. All of our departments were at half strength. We had evidently—word must have got out some way probably through our working employees that we would be hiring, and we had many applicants come in and walk through the picket line.

As to who replaced who, it is difficult to say because our production schedule was immediately cut back to ten. Our intention was to get up to 15 as rapidly as possible. We wanted new men to train to get back to 15 as soon as

possible, but as to what man filled what man's position, I can't honestly say.

Q But these men who were hired were hired to fill a complement for programming ten trailers a week?

A No. We had a complement for—those men were hired in preparation for increasing the production and getting it back up.

• • • •

[fol. 125]

• • • •

OFFER IN EVIDENCE

TRIAL EXAMINER: General Counsel's Exhibit No. 11, upon the offer of the respondent, is received in evidence.

(The document above referred to, heretofore marked General Counsel's Exhibit No. 11, was received in evidence.)

• • • •

[fol. 126]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 2

APPLICATION FOR EMPLOYMENT

Date NOV 9, 1963

Name in Full (please print) JAMES ERVING FULLER S. S. Number 564-50-9250

Address 3943-9TH ST (STREET) RIVERSIDE (CITY) CALIF (STATE) Phone No. OV 64033

Age 24 Date of Birth SEPT 15 1939 U. S. Citizen? YES ☒ NO ☐ Married? YES ☐ NO ☒

Dependents NONE In Case of Emergency, Notify MRS GEORGE FULLER Tel. OV 64033

Previously Employed Here? YES ☐ NO ☒ Relatives or Friends Working Here NONE

Have You Any Chronic Ailment? YES ☐ NO ☒ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☒ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: NONE

Grade School Attended BRYANT ELEMTARY	Grade Completed 6	Year of Graduation 1953	
High School Attended POLYTECHNIC	Grade Completed 12	Year of Graduation 1959	
College Attended	Grade Completed	Year of Graduation	

Kind of Work Desired Wages Expected MATCHED SK. 1/ per hr

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME CAL-ELECTRIC POWER	2.32 $	From AUG 1963	CURTAILMENT
ADDRESS 380 N. PEPPER ST RIALTO		To NOV 1963	
NAME THRIFTY DRUG STORE	2.00	From JUNE 63	CURTAILMENT
ADDRESS 360 N. MAIN ST CORONA		To July 63	
NAME USA SECURITY AGENCY	150.00 M	From NOV 59	HONORABLE
ADDRESS		To OCT 62	DISCHARGE
NAME		From	
ADDRESS		To	
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☒	Electric drill	☒
Electric saw	☒	Electric screwdriver	☒
Electric welder	☐	Unisheers	☐
Lathe	☒	Electric planer	☒
Spray paint equipment	☐	Fork lift	☐

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT James E. Fuller

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

PR G-66

[fol. 127]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 11-14-63

Reason for Termination _____ Date Terminated _____

*EMPLOYMENT RECORD

GROUP INSURANCE MANUAL RECEIVED _____

EMPLOYMENT MANUAL RECEIVED _____

GROUP ASSIGNMENT			RATE	EVALUATION				
	FROM	TO	OF PAY	PERFORMANCE				REMARKS
				E	G	F	P	
CA	11-11		1.20					off 2-3-64 Dr. called in hive
CA	12-4		1.75					off 2-5-6-64 called in sick
CA	1-6-64		1.80					count time sick 4-3-64 at 1.42
CA WALL TOOL	2-3-64		1.85			✓		5-4-64 off called in Lindale shop
								off 7-10-64 Ill noon, called in
								off 7-16-64 called in sick
								Less @ 1st 7-28-64
								Less @ 4th 7-30-64
								off 8-6-64 strike
								LATE 12-28-64 2 MIN

NATIONAL LABOR RELATIONS BOARD
EXHIBIT NO. [illegible]
CASE NO. [illegible]
NO. PAGES [illegible]
IN THE MATTER OF [illegible]
WITNESS [illegible]
DATE [illegible]

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

[fol. 128]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 3

SEPT 28-64

APPLICATION FOR EMPLOYMENT

Date 19 AUG 64

Name in Full (please print) JAMES ERVING FULLER S. S. Number 564-50-9250

Address 3948-4th ST (STREET) RIVERSIDE (CITY) CALIF. (STATE) Phone No. OR 64033

Age 24 Date of Birth 15 SEPT 1939 U. S. Citizen? YES ☒ NO ☐ Married? YES ☐ NO ☒

Dependents 0 In Case of Emergency, Notify MRS. GEORGE E. FULLER Tel. [illegible]

Previously Employed Here? YES ☒ NO ☐ Relatives or Friends Working Here NONE

Have You Any Chronic Ailment? YES ☐ NO ☒ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☒ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: _____

Grade School Attended _____ Grade Completed _____ Year of Graduation _____

High School Attended _____ Grade Completed _____ Year of Graduation _____

College Attended _____ Grade Completed _____ Year of Graduation _____

Kind of Work Desired CA Wages Expected _____ per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo Yr	Reason for leaving
NAME		From	
ADDRESS NATIONAL LABOR RELATIONS BOARD		To	
NAME CASE NO. 21-CA-6160 EXHIBIT NO. GC-3		From	
ADDRESS NO. RICE DISPOSITION		To	
NAME		From	
ADDRESS IN THE MATTER OF		To	
NAME DATE 2/17/65 WITNESS		From	
ADDRESS BY		To	
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☐	Electric drill	☐
Electric saw	☐	Electric screwdriver	☐
Electric welder	☐	Unisheers	☐
Lathe	☐	Electric planer	☐
Spray paint equipment	☐	Fork lift	☐

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

JEFX3

SIGNATURE OF APPLICANT _____

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

X-99-6

[fol. 129]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 4

CALLED 10-20-64 TO BE MONDAY AM

APPLICATION FOR EMPLOYMENT CAD SHOP

Date 5/8/64

Name in Full (please print) LUTHER J MALZAHN S. S. Number 298-03-9972

Address 11124 ORIOLE DRIVE RIVERSIDE (STREET, CITY, STATE) Phone No. 687-0780

~~11960 Jurupa Ave Riverside Calif~~

Age 52 Date of Birth 7/22/11 U. S. Citizen? YES ☑ NO ☐ Married? YES ☐ NO ☑

Dependents None In Case of Emergency, Notify Mrs Janet Swidart Tel.

Previously Employed Here? YES ☐ NO ☑ Relatives or Friends Working Here No

Have You Any Chronic Ailment? YES ☐ NO ☑ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☑ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: None

Grade School Attended		Grade Completed	Year of Graduation
High School Attended Washington High Massillon O.		Grade Completed 9 Th	Year of Graduation
College Attended		Grade Completed	Year of Graduation

Kind of Work Desired Maintenance Wages Expected per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME H.B. Fuller Co Inc Wis.	Low 1.60	From 1956	Moved to
ADDRESS 24 Plum Massillon O.		To 1964	Calif
NAME Schindler Const. Co	2.46	From 1957	
ADDRESS Massillon, Ohio		To 1958	Laid off
NAME Schroeder Paint Co	2.75	From 1956	
ADDRESS Massillon, Ohio		To 1957	Laid off
NAME Reynolds Building Mtl.	2.78	From 1958	
ADDRESS Canton, Ohio		To 1966	Laid off
NAME Republic Steel Corp.	2.41½	From 1936	Quit to go
ADDRESS Massillon, Ohio		To 1942	into armed forces

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☑	Electric drill	☑
Electric saw	☑	Electric screwdriver	☐
Electric welder	☐	Unisheers	☐
Lathe	☐	Electric planer	☐
Spray paint equipment	☑	Fork lift	☑

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT Luther J Malzahn

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

2-PR-6

[fol. 130]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 5-12-64

Reason for Termination _____ Date Terminated _____

*EMPLOYMENT RECORD

GROUP ASSIGNMENT			RATE	EVALUATION				
	FROM	TO	OF PAY	PERFORMANCE				REMARKS
				E	G	F	P	
CA	5-12-64		1.70					off 86-64 strike
" Radio Dept	6-1564		1.75			✓		
" "	7-13-64		1.80			✓		
								9-25-64 RECEIVED NOTICE FROM OHIO THAT HE HAD APPLIED FOR COMPEN IN OHIO

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

[fol. 131]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 5

~~Applicant~~ Sent Letter for 9-9-63 INS

APPLICATION FOR EMPLOYMENT

Date 8-8-63

Name in Full (please print) RONALD KENNETH HUTH S. S. Number 575-52-0707

Address ~~3674~~ 9222 PALM ROSE ST. ARLINGTON ~~6798 EAST MAGNOLIA AVE. RIVERSIDE~~ STATE Phone No.

Age 20 Date of Birth 1-9-43 U. S. Citizen? YES NO Married? YES NO

Dependents None In Case of Emergency, Notify Veronica Huth Tel. LA

Previously Employed Here? YES NO Relatives or Friends Working Here Raymond Tinsley

Have You Any Chronic Ailment? YES NO Have You Ever Been Convicted of Any Crime? YES NO If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: Vision in Left eye

Grade School Attended Mc KINLAY Grade Completed 8 th Year of Graduation

High School Attended Bell High Grade Completed 12 th Year of Graduation 1961

College Attended Grade Completed Year of Graduation

Kind of Work Desired Cabinet & Woodwork Wages Expected $1.65 per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME Royle Scot		From	
ADDRESS 13th & Market Riverside	$1.50	To	
NAME LA Mirada Car Wash	$1.25	From	
ADDRESS 1565 Magnolia BLV.		To	
NAME D & L Dairy	$1.00	From	
ADDRESS Long Beach BLVD, Canton		To	
NAME		From	
ADDRESS		To	
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☒	Electric drill	☐
Electric saw	☒	Electric screwdriver	☐
Electric welder	☐	Unisheers	☐
Lathe	☐	Electric planer	☐
Spray paint equipment	☐	Fork lift	☐

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT Ronald K Huth

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

PE-O-66

[fol. 132]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 9-9-63

Reason for Termination _____ Date Terminated _____

*EMPLOYMENT RECORD

GROUP INSURANCE MANUAL RECEIVED _____

EMPLOYMENT MANUAL RECEIVED _____

GROUP ASSIGNMENT			RATE OF PAY	EVALUATION				
	FROM	TO		PERFORMANCE				REMARKS
				E	G	F	P	
Ca	9-9-63		1.20					
	10-7		1.71					
	11-4		1.80					
	12-2		1.85			✓		2-10-64 PERMITTED INTERNATIONAL TO STAND UP ON HIS WORK CURRENT SUFFERS DAMAGE WHILE FOR THE FURNITURE (CHAMPION) HE MADE
								2-17-64 Carriage now ready to be made to order
								3-27-64 called in sick
								4-2-64 off to Zeke's Birthday Party
								4-9-64 late (47 min) overslept
								5-12-64 late (4 min)
								left 5-19-64 at 2:30 blood test
								left 5-22-64 for ½ hr accident & ins
								late 6-1-64 (12 min) overslept
								off 6-8+9-64 to get married
								late 6-25-64 (4 min) overslept
								late 7-8-64 (42 min) overslept
								late 7-15-64 (56 min) overslept
								late 7-20-64 (4 min) overslept
								late 7-29-64 (6 min) overslept
								off 8-6-64 strike

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

EXHIBIT NO. _____ DISPOSITION _____ WITNESS _____ DATE _____ BY _____

[fol. 133]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 6

MONDAY AM

APPLICATION FOR EMPLOYMENT

Date May 6, 1964

Name in Full (please print) DAVID WILLIAM DAVIS S. S. Number 560-62-4554

Address 24450 WEBSTER AVE (STREET) SUNNYMEAD (CITY) CALIF (STATE) Phone No. 653-1842 (NEXT DOOR)

Age 19 Date of Birth SEPT. 1, 1944 U. S. Citizen? YES [X] NO [ ] Married? YES [X] NO [ ]

Dependents 4 In Case of Emergency, Notify SHEILA M. DAVIS Tel. 653-1842

Previously Employed Here? YES [ ] NO [X] Relatives or Friends Working Here NONE

Have You Any Chronic Ailment? YES [ ] NO [X] Have You Ever Been Convicted of Any Crime? YES [ ] NO [X] If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: NONE

Grade School Attended SUNNYMEAD ELEMENTAY	Grade Completed 6	Year of Graduation	
High School Attended POLY HIGH SCHOOL.	Grade Completed 10	Year of Graduation	
College Attended	Grade Completed	Year of Graduation	

Kind of Work Desired TRAILER ASSEMBLER TRAINEE Wages Expected $1.70 per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME RICHARD MILLER	$1.35	From July 1963	Laid off
ADDRESS Adams Ave Riverside Calif		To Dec. 1963	
NAME MARCH AIR FORCE BASE EXCHANGE		From Aug. 1962	
ADDRESS MACHAR FORCE BASE Edgemont		To Oct. 1963	Laid off
NAME MERCHANTS FARMS		From Feb. 1964	Temporary
ADDRESS		To Feb. 1964	
NAME		From	
ADDRESS		To	
NAME		From	
ADDRESS		To	

~~NATIONAL LABOR RELATIONS BOARD~~
~~CASE NO. [illegible] EXHIBIT NO. GC-X-6~~
~~NO. PAGES [illegible] DISPOSITION [illegible]~~
~~IN THE MATTER OF [illegible]~~
~~DATE [illegible] WITNESS [illegible]~~
~~BY [illegible]~~

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	[X]	Electric drill	[X]
Electric saw	[X]	Electric screwdriver	[X]
Electric welder	[ ]	Unisheers	[ ]
Lathe	[X]	Electric planer	[ ]
Spray paint equipment	[X]	Fork lift	[ ]

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT David M Davis

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

I-PR-6

[fol. 134]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 5-6-64

Reason for Termination _____ Date Terminated _____

Rec Employment Manual *EMPLOYMENT RECORD

GROUP ASSIGNMENT			RATE	EVALUATION				
	FROM	TO	OF PAY	PERFORMANCE				REMARKS
				E	G	F	P	
EXT	5-6-64		1.70					off 6-19-64 no call in
EXT Painting	6-8-64		1.75			✓		late 6-29-64 29 min no call
" "	7-8-64		1.80			✓		off 7-8-64 called in sick
								late 7-20-64 (20 min)
								late 7-22-64 (4 hr.) sick
								late 7-27-64 (31 min)
								off 8-6-64 strike

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

[fol. 135]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 7

Applicant Resigning This was first

APPLICATION FOR EMPLOYMENT

CALLED 10-29 TO CALL BACK

Date July 15, 1964

Name in Full (please print) Lonnie Dean Painter S. S. Number 571-66-3778

Address 3784 (STREET) Pacific (CITY) Rubidoux (STATE) Phone No. OV-30487

Age 19 Date of Birth Nov. 17, 1944 U. S. Citizen? YES ☑ NO ☐ Married? YES ☐ NO ☑

Dependents 3 In Case of Emergency, Notify Donna Painter Tel. 30487

Previously Employed Here? YES ☐ NO ☑ Relatives or Friends Working Here _____

Have You Any Chronic Ailment? YES ☐ NO ☑ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☑ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: none

Grade School Attended West Riverside Grade Completed 6 Year of Graduation 1959

High School Attended Wrangell High, Alaska Grade Completed 12 Year of Graduation 1963

College Attended _____ Grade Completed _____ Year of Graduation _____

Kind of Work Desired _____ Wages Expected $ 1.70 per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME Rohr Corp.	2.03	From Jan. 1964	Lack of work
ADDRESS Riverside Calif.		To March 1964	
NAME National Riverside Heater Co	1.65	From Sep. 1963	Plant moved
ADDRESS 6th + Vine Riverside		To Jan. 1964	
NAME Mormans Carpet Service	1.50	From Jan. 1963	not enough hr.
ADDRESS 6099 Mission Blvd. Rubidoux		To Sep. 1963	
NAME		From	
ADDRESS		To	
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☑	Electric drill	☑
Electric saw	☑	Electric screwdriver	☐
Electric welder	☐	Unisheers	☑
Lathe	☐	Electric planer	☑
Spray paint equipment	☐	Fork Lift	☑

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT Lonnie Painter

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN any WAY OBLIGATE THE COMPANY

I-PS-4

[fol. 136]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 7-16-64

Reason for Termination LATE & ABSENT TOO MUCH Date Terminated 1-22-65

*EMPLOYMENT RECORD

GROUP ASSIGNMENT			RATE	EVALUATION				
	FROM	TO	OF PAY	PERFORMANCE				REMARKS
				E	G	F	P	
EXT-FIN	7-16-64		1.70					off 8-6-64 strike
								SEE other SHEET
								12-28-64 1 HR. Late
								1-5-65 Called in Sick
								1-6-65 OFF 3 HRS. SICK
								1-7+8 Did Not WORK
								WENT TO SEE LAWYER
								1-14-65 OFF 4 HOURS.
								1-18-65 OFF CAR WRECK
								1-19-65 2 HR 15 min. Late
								1-21-65 1 HR Late
								1-22-65 OFF Did Not Call in

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

[fol. 137]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 8

INS ✓

APPLICATION FOR EMPLOYMENT

Date NOV 4 1963

Name in Full (please print) MARY I NEVINS S. S. Number 454-38-1951

Address 1650 LE CONTE DR (STREET) RIVERSIDE (CITY) CALIF (STATE) Phone No. OV6-8754 / 688-4610

Age 35 Date of Birth AUG. 27, 1928 U. S. Citizen? YES ☐ NO ☐ Married? YES ☐ NO ☐

Dependents NONE In Case of Emergency, Notify WILLIAM E. NEVINS Tel. OV9-1502 377

Previously Employed Here? YES ☐ NO ☒ Relatives or Friends Working Here NO

Have You Any Chronic Ailment? YES ☐ NO ☒ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☒ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: NONE

Grade School Attended VALDASTA Grade Completed 8 Year of Graduation 1941

High School Attended BOYD HIGH SCHOOL Grade Completed 12 Year of Graduation 1945

College Attended _____ Grade Completed _____ Year of Graduation _____

Kind of Work Desired _____ Wages Expected _____ per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME SAN BERNARDINO BLUE PRINT		From 6/26/63	
ADDRESS 398 3rd ST SANBERNARDINO	1.65 PER HR	To 11/1/63	DUE TO WORK READ [illegible]
NAME RAHR CORP		From 10/58	
ADDRESS 8200 ARLINGTON	2.35 PER HR	To 6/62	DUE TO HOME READ [illegible]
NAME BOURNS LABATORIES		From 4/57	
ADDRESS 1200 COLUMBIA	1.50 PER HR	To 10/58	FOR DAY TIME WORK
NAME BOURNS LABATORIES		From 4/56	
ADDRESS 1200 COLUMBIA	1.35 PER HR	To 12/56	DUE TO PREGNANCY
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☐	Electric drill	☐
Electric saw	☐	Electric screwdriver	☐
Electric welder	☐	Unishears	☐
Lathe	☐	Electric planer	☐
Spray paint equipment	☐	Fork lift	☐

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT Mary I. Nevins

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN any WAY OBLIGATE THE COMPANY

PS-0-66

[fol. 138]

APPLICANT: DO NOT WRITE ON THIS SIDE

References checked by _____ Date started 11-5-63

Reason for Termination _____ Date Terminated _____

*EMPLOYMENT RECORD

GROUP INSURANCE MANUAL RECEIVED Mail 11

EMPLOYMENT MANUAL RECEIVED Mail 11

GROUP ASSIGNMENT			RATE	EVALUATION				
	FROM	TO	OF PAY	PERFORMANCE				REMARKS
				E	G	F	P	
Eff	11-5		1.70					Late 2 times w/e 2-2-64
	12-4		1.75					Late (3 min) 4 times w/e 2-16-64
	1-6-64		1.80					Late 2 times w/e 2-23-64
	2-3-64		1.85			✓		Late 3-13-64 (4 min)
								Late 3-18-64 (4 min)
								Late 3-30-64 (2 min)
								off 4-10-64 called in sick
								Late 4-22-64 (4 min)
								Late 4-29-64 (5 min) overstay
								Late 5-7-64 (2 min)
								Late 6-2-64 (2 min)
								off 6-29,30,1,2-64 maternity isolation
								off 7-16-64 called in sick
								Late 7-21-64 4 min
								off 8-6-64 strike

Forwarding Address _____

*INSTRUCTIONS:

1. Group Assignment—Indicate to what group employee assigned or transferred to in 1st column. Date of assignment to group in second column. Date of transfer, promotion, or termination in 3rd column.
2. Rate of Pay—Indicate rate of pay for assigned job.
3. Evaluation—(A) Performance—E - Excellent, G - Good, F - Fair, P - Poor. Check one.
   (B) Remarks—Indicate basis on which performance has been graded.

[fol. 139]

BEFORE THE NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 9

Called 9-26-64 Called 9-7-64

10-21-64 Came in 9-28-64 Came in

APPLICATION FOR EMPLOYMENT

Date 9-19-64

Name in Full (please print) NEVINS MARY I S. S. Number 456-38-1951

Address 1650 LE CONTE (STREET) RIVERSIDE (CITY) CALIF (STATE) Phone No. OV6-8775

Mother in law - OV 93220

Age ____ Date of Birth ____ U. S. Citizen? YES ☐ NO ☐ Married? YES ☐ NO ☐

Dependents ____ In Case of Emergency, Notify ____ Tel. ____

Previously Employed Here? YES ☐ NO ☐ Relatives or Friends Working Here ____

Have You Any Chronic Ailment? YES ☐ NO ☐ Have You Ever Been Convicted of Any Crime? YES ☐ NO ☐ If Yes, Give Details (WHEN, WHERE, DISPOSITION)

List Any Physical Defects That You Presently Have: ____

Grade School Attended ____ Grade Completed ____ Year of Graduation ____

High School Attended ____ Grade Completed ____ Year of Graduation ____

College Attended ____ Grade Completed ____ Year of Graduation ____

Kind of Work Desired SQUAK Wages Expected ____ per hour

GIVE BELOW THE NAMES AND ADDRESSES OF YOUR FORMER EMPLOYERS (list last employer first)

EMPLOYERS	HOURLY WAGE	Mo. Yr.	Reason for leaving
NAME		From	
ADDRESS NATIONAL LABOR RELATIONS BOARD		To	
NAME CASE NO. 21-CA-6460 EXHIBIT NO.		From	
ADDRESS NO. PAGES 1 DISPOSITION		To	
NAME IN THE MATTER OF Electrical Master		From	
ADDRESS		To	
NAME DATE WITNESS		From	
ADDRESS		To	
NAME		From	
ADDRESS		To	

Check the Tools and Equipment you have worked with:

Small hand tools (hammer, screwdriver, etc.)	☐	Electric drill	☐
Electric saw	☐	Electric screwdriver	☐
Electric welder	☐	Unisheers	☐
Lathe	☐	Electric planer	☐
Spray paint equipment	☐	Fork lift	☐

I hereby verify that the above statements are true and authorize the Company to investigate any of the information included on this application. It is understood that false statements may be sufficient cause for dismissal.

SIGNATURE OF APPLICANT ____

THE USE OF THIS BLANK DOES NOT INDICATE THERE ARE POSITIONS OPEN AND DOES NOT IN ANY WAY OBLIGATE THE COMPANY

8-PR-6

[fol. 140] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

GENERAL COUNSEL'S EXHIBIT 11

GIBSON, DUNN & CRUTCHER
LAWYERS
634 South Spring Street
Los Angeles, California 90014
MADISON 0-9300

Cable Address: Gibtrask

November 2, 1964

Our File Number
L 5110-2-9

Mr. Bruce Berry
Attorney, National Labor
Relations Board
849 South Broadway
Los Angeles 14, California

Dear Mr. Berry:

I enclose herewith a statement showing the 21 employees hired during the strike at Fleetwood Trailer Company, the date of their hire, and the department to which they were assigned. Since we did not hire nearly as many replacements as the number of persons on strike, it is really impossible to supply a statement indicating which individual strikers the new employees replaced.

I hope this information will permit you to make an early disposition of this charge.

Very truly yours,

/s/ Hugh J. Scallon
HUGH J. SCALLON
for GIBSON, DUNN & CRUTCHER

HJS:rn
Enc.

• • • •

[fol. 141]

[TRADEMARK] 10-29-64

FLEETWOOD TRAILER CO., INC.
3200 Myers Street, Riverside, California 92503
P.O. Box 7728, Phone: 688-5353

EMPLOYEES HIRED DURING STRIKE PERIOD

NAME	DATE HIRED	Department
T. Chastain	8-11-64	Cabinet Setting
A. Combe	8-12-64	Cabinet Assembly
R. DeWitt	8-11-64	Floors
H. Herrera	8- 6-64	Floors
J. Hamilton	8-11-64	Cabinet Assembly
H. Hill	8-13-64	Cabinet Assembly
H. Huerata	8- 6-64	Floors
P. Husted	8- 7-64	Janitor
B. Jaure	8-11-64	Cabinet Assembly
R. Johnson	8-10-64	Cabinet Assembly
R. Matthews	8-13-64	Extra (Squwaking)
M. Peters	8- 6-64	Cabinet Assembly
H. Skaggs	8-13-64	Extra (Squawking)
R. Smith	8-13-64	Extra (Squawking)
F. Stratton	8-13-64	Sheet Metal
F. Uribe	8-13-64	Extra (Squawking)
B. Wilton	8- 6-64	Cabinet Assembly
D. Greek	8-13-64	Extra (Squawking)
D. Henderson	8-13-64	Cabinet Assembly
D. Fulk	8- 7 64	Sheetmetal
C. Burleson	8- 7-64	Sidewalls

/s/ C. D. Chapman
C. D. CHAPMAN
Plant Manager

[fol. 142] BEFORE THE
NATIONAL LABOR RELATIONS BOARD

RESPONDENT'S EXHIBIT 2

[TRADEMARK]

FLEETWOOD TRAILER CO., INC.

3200 Myers St., P.O. Box 7728,
Riverside, California 92503 • Phone: 688-5353

Production Schedule: July 1st, 1964, through Dec 20, 1964

Week Ending		
	7- 5-64	15 units
	7-12-64	17
	7-19-64	20
	7-26-64	17
	8- 2-64	18
	8- 9-64	12 (week of strike)
	8-16-64	7
	8-23-64	14
	8-30-64	14
	9- 6-64	12
	9-13-64	6
	9-20-64	12
	9-27-64	12
	10- 4-64	19
	10-11-64	14
	10-18-64	15
	10-25-64	16
	11- 1-64	16
	11- 8-64	16
	11-15-64	17
	11-22-64	19
	11-29-64	14
	12- 6-64	19
	12-13-64	20
	12-20-64	20

• • • •

[fol. 143] TXD-(SF)-48-65
Riverside, Calif.

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

DIVISION OF TRIAL EXAMINERS
BRANCH OFFICE

SAN FRANCISCO, CALIFORNIA

Case No. 21-CA-6160

FLEETWOOD TRAILER CO., INC.

and

LIONEL RICHMAN

BRUCE H. BERRY, ESQ., of Los Angeles, Calif., for the General Counsel.

GIBSON, DUNN & CRUTCHER, by HUGH J. SCALLON, ESQ., of Beverly Hills, Calif., for the Respondent.

BEFORE: WALLACE E. ROYSTER, Trial Examiner.

TRIAL EXAMINER'S DECISION—April 16, 1965

STATEMENT OF THE CASE

This matter was tried before me in Los Angeles, California, on February 17, 1965.[1] At issue is whether Fleetwood Trailer Co., Inc., herein the Respondent, since August 20, 1964,[2] has unlawfully discriminated against Mary Nevins, Lonny Painter, Luther Malzahn, James Fuller, David Davis and Ronald Kluth, by refusing to reemploy these individuals upon unconditional application following the termination of an economic strike.

Respondent, by its answer, asserts that these strikers had been permanently replaced prior to their applications and that no unfair labor practice was committed.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

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[1] Charge filed and served September 10, 1964. Complaint alleging violations of Section 8(a)(1) and (3) of the Act issued December 11, 1964.

[2] All dates hereafter mentioned are in 1964.

FINDINGS OF FACT

I. The business of the Respondent

The Respondent is a California corporation engaged at Riverside, California, in the manufacture of mobile homes. Annually, it receives goods valued at in excess of $50,000 from points outside the State of California, and sells and [fol. 144] distributes products valued at more than that amount directly to points outside the State of California. It is conceded, and I find, that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

II. The labor organization involved

San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

III. The unfair labor practices

On August 6, in support of the Union's bargaining demands, Respondent's employees began a strike which ended on August 18. During this period, some of those on strike returned to work and some new workers were hired. At the conclusion of the strike the Respondent had 71 employees on its payroll. On August 18, the respondent and the Union met with the result that the Union agreed to terminate the strike and accept Respondent's last contract offer. Attorney Jerome Byrne, the Respondent's representative, testified that on this occasion he told the Union representatives that the plant was not in need of employees and that no strikers could be given immediate employment. Byrne said that he would not put the strikers on a preferential hiring list but assured the Union that the Respondent would not discriminate in any way against them. Byrne said, in effect, that any striker who wished to return to work should make known his desire to the Respondent and renew his application at the expiration of succeeding 30-day periods if he maintained interest

in returning to work. Byrne made it clear to the Union, he testified, that the Respondent would consult the list of striker applicants whenever a vacancy developed, but that the Respondent would feel free to hire from any source.[3] On August 20, the six individual strikers named earlier in this Decision applied for reemployment. Before any of them was reemployed the Respondent hired, in the period from October 8 through October 16, six individuals who had not perviously been in Respondent's employ. It is the contention of the General Counsel that the six striker applicants should have been returned to work in these vacancies.

Before the strike began the Respondent had a work force of sufficient size (about 108) so that it programmed the building of 20 mobile homes a week. When the strike began, the Respondent decided to cut this programming in half and cancelled or postponed deliveries of supplies and materials consistent with this decision. With the return of some of the strikers before August 18 and the employment of new workers, it was decided to attempt the production of about 15 trailers a week. At all times it was Respondent's intention to return to the full production of 20 trailers as soon as a sufficiently experienced work force was assembled and materials were at hand. This goal was reached about December 13.

Respondent contends that at the expiration of the strike, because it had then no need for additional employees, all of the strikers had been replaced, that in consequence they thereafter had no employment rights with the Respondent and were entitled to no more than a nondiscriminatory [fol. 145] consideration of their applications for work. The position of the General Counsel is that the lack of need for additional workers on August 18 represented a temporary condition; that the striker applicants named herein had not then been replaced.

The six applicants visited the plant or telephoned the Respondent on a number of occasions on and after August 20. All were reemployed in the period from November 2 through December 14.

---

[3] The Union bowed to this decision.

The position of the Respondent that all of the strikers had been replaced permanently before they offered to return to work is based upon the circumstance that on August 20 the Respondent had no immediate need for more employees. This circumstance is not challenged by the General Counsel and I find it satisfactorily to be established by the evidence. If it is true that the strikers had been permanently replaced, as the Respondent contends, then the six applicants named in the complaint had lost any right to reinstatement or preferential hiring. This is the status, in the view of the Respondent, that they occupied. Each was required to register his continued interest in employment with the Respondent every month and failure to do so was "disqualifying." Respondent did not however apply this rule strictly and called to the attention of a Union representative the fact that some had failed to register within the set period. When these tardy ones appeared at the plant they were permitted to regain their status as applicants. However, in my view of the case, none of the six had been permanently replaced when they offered to return to work. There is no evidence that any person was hired during the strike specifically to fill the job of any of them. The lack of job openings on August 20 was a temporary condition which the Respondent knew would change and intended to change. It was its purpose, later achieved, to return to full production and to a full crew as soon as practicable. I think it thus inaccurate to say that any of the applicants concerned here had lost his employment with the Respondent by reason of replacement.

The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired. This holding is qualified only by the condition that a refusal to reinstate may be justified upon a showing by the employer that he acted upon nondiscriminatory considerations.[4] The

[4] *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 871. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493-494, arises in a different factual setting. I find that holding concerning the right of reinstatement of economic strikers to jobs not open at the time of application not controlling here.

Respondent has undertaken to make that showing in respect to the six applicants.

The Respondent attempts to hire what it describes as willing workers, between the ages of 19 and 25, and with satisfactory employment histories. No particular experience is required.

The first hire after the end of the strike was of Eddie Latinsky as a cabinet assembler on October 8; the second, in the same classification, of Gilbert Herrara on October 12. Neither had worked at any earlier time for the Respondent and their qualifications for hire do not appear in the record. Of the six applicants named in the complaint, Malzahn, Kluth, Nevins and Fuller had worked in cabinet assembly before the strike. There is no testimony on the part of the Respondent to indicate why none of these (other than Fuller) was reinstated to the positions for which Latinsky and Herrara were hired.

[fol. 146] Also on October 12 Jimmy Benson was hired as a flooring employee and Everett Leffen as a sidewall employee. Plant Manager Cecil B. Chapman testified that Kluth, Nevins and Malzahn were not physically capable of handling these jobs and that for the same reason none of the three was qualified to handle the job of cabinet assembler for which Billy Valk was hired on October 16. Chapman also testified that the job of finisher, for which a new employee Dwayne Nash was hired on October 13, was unsuited to Nevins because she could not perform all of its functions; that he preferred to have a younger man than Malzahn on that job; and that he had "serious doubt" that Kluth, because of impaired eyesight could handle it. The qualifications of none of the newly hired employees is mentioned in the record.

Chapman testified that none of the striker applicants was disqualified for these job opportunities on the basis of their prior work records with "possibly one exception," Fuller. Chapman explained that Fuller was absent on a number of occasions but, more importantly, about a week before the strike began had engaged in a "small hassle" with his supervisor. The incident was reported to Chapman who considered that it "bordered on insubordination."

I note that no unfair labor practices are alleged other than in respect to bringing the striker applicants back to work and that, save for whatever inferences may be drawn from action or lack of action in that connection, no Union animus is alleged or shown. I am not convinced that the Respondent had a conscious purpose to discriminate against the strikers but I nonetheless find that it did so.

Basically, this discrimination consists in the Respondent's position that at the conclusion of the strike all strikers had been replaced. Thereafter, instead of treating those strikers who asked for reinstatement as their status required, the Respondent saw them only as applicants for employment who were entitled to no more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees. Their right to employment was not enhanced by reason of the strike but as long as they were not permanently replaced, neither was it diminished. It does not appear that the Respondent considered Latinsky and Herrara to be better qualified to work in cabinet assembly than Nevins, Malzahn, Fuller or Davis; or that Benson, Leffen, Nash and Valk were better qualified as workmen than Painter or Fuller or Davis. Nevins could not handle a job unsuited to a female, Kluth could not work where normal eyesight was a requirement and Malzahn was disqualified only to the extent that any man of his age (53) might have been. I find that the six job openings in October could have been filled by the striker applicants and, had the Respondent considered them as employees rather than as mere applicants for hire, would have been so filled. This is so even though the Respondent had some reason for dissatisfaction with Fuller. The Respondent did not consider that he was disqualified for employment.

I find that by failing to return Lonny Painter, Luther Malzahn, David Davis, Mary Nevins, Ronald Kluth and James Fuller to employment when the October vacancies developed, the Respondent discriminated against these individuals because of participation in a lawful strike, thus discouraging membership in and activity on behalf of the Union. The Respondent has thereby engaged in unfair

labor practices within the meaning of Section 8(a)(3) of the Act.

[fol. 147] This conduct interfered with, restrained and coerced employees in the exercise of rights guaranteed in Section 7 of the Act and, I find, the Respondent thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The actions of the Respondent described in Section III above, occurring in connection with its operations have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. All of the affected individuals have been rehired and there is no claim that they were not fully reinstated. The Respondent shall make each whole for any loss of earnings attributable to the failure on the part of the Respondent to return them to employment in the period from October 8 through October 16. This loss shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company*, 90 NLRB 289, and shall bear interest at the rate of 6 percent per annum computed quarterly.

On the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce or in an operation affecting commerce within the meaning of Section 2(6) and (7) of the Act.

3. By failing to return Painter, Matzahn, Davis, Nevins, Kluth and Fuller to employment in October 1964, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a)(1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Discouraging membership in or lawful strike activity in behalf of any labor organization by discrimination in regard to hire or tenure of employment or any term or condition of employment.

[fol. 148] (b) In any like or similar manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the purposes of the Act:

(a) Make Painter, Malzahn, Davis, Nevins, Kluth and Fuller whole for any loss of earnings in the manner set forth in the portion of this Decision entitled "The remedy."

(b) Post at its plant in Riverside, California, copies of the notice attached hereto as an Appendix.[6] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region shall, after being duly signed by

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[6] In the event these recommendations be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words, "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's order be enforced by a decree of the United States Court of Appeals, the words, "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words, "A DECISION AND ORDER."

an authorized representative of the Respondent, be posted by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of receipt of this Recommended Order what steps have been taken in compliance.[6]

Dated: April 16, 1965

/s/ Wallace E. Royster
Trial Examiner

[6] If these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

[fol. 149] APPENDIX TO DECISION

NOTICE TO ALL EMPLOYEES

PURSUANT TO

The Recommended Order of a Trial Examiner of the

NATIONAL LABOR RELATIONS BOARD

and in order to effectuate the policies of the

NATIONAL LABOR RELATIONS ACT

we hereby notify our emloyees that:

WE WILL NOT discriminate against any employee because he has engaged in a lawful strike or has participated in concerted activity in behalf of any labor organization.

WE WILL make MARY NEVINS, LONNY PAINTER, LUTHER MALZAHN, JAMES FULLER, DAVID DAVIS and RONALD KLUTH whole for any loss of earnings attributable to the delay in returning them to work.

WE WILL NOT by discriminating against strikers or in any like or similar manner interfere with, restrain or coerce employees in the exercise of rights guaranteed in Section 7 of the Act.

FLEETWOOD TRAILER CO., INC.
(Employer)

Dated ..... By .....
(Representative) (Title)

This Notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this Notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, 849 So. Broadway, Los Angeles, California (Telephone No.—688-5204).

[fol. 150]

D-8102
Riverside, Calif.

153 NLRB No. 43

BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Case No. 21-CA-6160

FLEETWOOD TRAILER CO., INC.

and

LIONEL RICHMAN.

DECISION AND ORDER—June 24, 1965

On April 16, 1965, Trial Examiner Wallace E. Royster issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Order recommended by the Trial Examiner, and orders that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors,

and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D. C., June 24, 1965.

JOHN H. FANNING, Member

GERALD A. BROWN, Member

HOWARD JENKINS, JR., Member

National Labor Relations Board

(SEAL)

[1] The telephone number for Region 21, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to Read: Tel. No. 688-5229.

[fol. 151]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

• • • •

[Minute entry of argument and submission—
June 8, 1966 Omitted in printing]

[fol. 152]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

• • • •

[Minute entry of order directing filing of opinion, concurring opinion, dissenting opinion and filing and recording of decree—September 8, 1966 Omitted in printing]

[fol. 153]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,511

NATIONAL LABOR RELATIONS BOARD, PETITIONER

vs.

FLEETWOOD TRAILER CO., INC., RESPONDENT

On Petition for Enforcement of an Order of the National Labor Relations Board

OPINION—September 8, 1966

BEFORE: POPE, BARNES and ELY, Circuit Judges

BARNES, Circuit Judge:

This is a petition for the enforcement of an order of the National Labor Relations Board. It had jurisdiction of the unfair labor practice complaint alleged in this case pursuant to 29 U.S.C. § 160(a)(b). This court has jurisdiction of this petition pursuant to 29 U.S.C. § 160(e).

Respondent is engaged in the manufacture of house trailers at Riverside, California. Respondent's employees are represented by the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO. At the beginning of August 1964, respondent employed approximately one hundred and ten persons and was producing twenty mobile homes per week.

In late 1964 respondent was engaged in negotiations for a collective bargaining agreement with the union. On August 6, 1964, a number of respondent's production workers went on strike in support of their contract demands. Approximately one-half of respondent's employees either did not go on strike, or crossed the picket lines to return to work within a few days. Respondent imme-
[fol. 154] diately began to hire replacements for those who did strike and by August 18, 1964 had hired twenty-one new employees.

On August 18, 1964, the union agreed to end the strike and to accept respondent's last contract offer. The parties agreed that the strikers would not be put on a preferential hiring list but would be considered on a nondiscriminatory basis if they applied for employment. At the conclusion of the strike respondent did not return to its full pre-strike production force but determined to continue production with the crew of seventy-one which it had at the end of the strike. The six employees or former employees who are the complaining parties in these proceedings applied for employment on August 20, 1964. Between October 8 and October 16, 1964, respondent hired six new employees and passed over the strikers in doing so. The strikers were not rehired until December 1964.

On September 10, 1964 (before any hiring or any "passing over"), the complaining former employees filed a complaint with the NLRB. An amended complaint was filed in November 1964. Hearings were had before Trial Examiner Wallace E. Royster on February 17, 1965, and on April 16, 1965 the trial examiner filed his decision. In it he found that respondent had committed an unfair labor practice by treating its former employees as applicants for new employment without any employee status, in violation of section 8(a)(1) and (3) of the National Labor Relations Act. On June 24, 1965, a three member panel of the NLRB (Fanning, Brown, Jenkins) adopted the decision and recommendations of the trial examiner. This petition by the NLRB for enforcement of its order followed.

We first note that it is undisputed that there was in this case no conscious intent on the part of the employer to discriminate. The trial examiner so found, and the Board affirmed. With this in mind, we turn to specific facts.

The main issue at dispute in these proceedings is whether or not the complaining strikers had been replaced or their jobs absorbed while they were on strike. If their jobs had not been filled or eliminated due to a decrease in production, the strikers were entitled to be treated as employees and to be given preference over other job applicants.

[fol. 155] Section 8(a)(1) and (3) of the NLRA which respondent is alleged to have violated in hiring new appli-

cants before rehiring the six complaining strikers provides:

"§ 8. Unfair Labor Practices.

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

• • • •

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: . . . ."

The leading case interpreting this section held that the employer has a duty to reinstate those strikers who had not been permanently replaced, but need not remove replacements to reinstate the strikers. *N.L.R.B.* v. *Mackay Co.*, 304 U.S. 333 (1938).

The disagreement in the present proceedings centers on whether the jobs of the six complaining strikers had been filled so as to remove the requirement on respondent to rehire them on a preferential basis. Respondent contends that it cut back its labor force and production plans during and following the strike, and that as a result, the jobs of the strikers were either abolished or absorbed by other employees; and that such abolition or absorption amounts to replacement. Petitioner, on the other hand, contends that respondent intended to return to pre-strike production levels as soon as possible and that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall within the foreseeable future.

Respondent's contention that the abolition or absorption of a job is equivalent to replacement is a correct statement of the law. *Atlas Storage Division*, 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team. & H., etc.* v. *N.L.R.B.*, 233 F.2d 233 (7th Cir. 1956). It remains to

be seen whether respondent's factual view of the case, or that of petitioner, is supportable. But before passing to [fol. 156] an examination of that question, we first desire to deal with petitioner's legal contention that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall to work within the foreseeable future. In support of this position petitioner cites *Servel, Inc.*, 65 NLRB 1067 (1946); *Hubbard & Co.*, 45 NLRB 1 (1942); *Drayer-Hanson Incorporated*, 86 NLRB 111 (1949); *Glenn I. Martin Co.*, 74 NLRB 546 (1947); *General Motors Corp.*, 113 NLRB 876 (1955); *Lima Hamilton Corp.*, 87 NLRB 455 (1949). All of these cases deal with the question of whether employees who had been laid off, but who (it was contended) would probably be recalled in the foreseeable future, *should be permitted to vote in a representation election.* To our knowledge the National Labor Relations Board has never applied this "reasonable expectation of recall within the foreseeable future" as a test to determine whether or not a striker has been replaced. And we are not inclined to do so. Many of these cases make it clear that the policy is based on the theory that employees who are quite certain to be recalled should be given a voice in selecting the bargaining agent who will represent them. Such an element does not here exist. An examination of the facts of the individual case seems preferable where the question is one of whether an employer has committed an unfair labor practice.

Turning to the factual merits of respondent's contention that the jobs of the complaining strikers had been absorbed or abolished as a result of reduced production following the strike, we are met at the outset with the existence of a Board decision laying down the rule that the question of whether or not a striker has been replaced is to be determined on the date on which the striker makes his offer to return to work. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493 (1961). The trial examiner referred to this case and held that it was not controlling, without discussing why it was not controlling. (CT 13.) We cannot agree with the trial examiner. We find it difficult to approve the Board's cavalier use of precedent when it

desires to follow it, and the disregard of it when it wishes to achieve a different result. On the basis of the Board's own policy as stated in *Brown and Root, supra*, we hold that whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike. [fol. 157] Tested by this standard the record in these proceedings is devoid of any evidence to establish that the jobs of the six complaining strikers were still available on August 20, 1964, when they applied for reinstatement. The respondent had made a decision during the strike to curtail production. The work force at the end of the strike numbered seventy-one employees, and despite the testimony of the administrative vice-president of respondent that the longest it would take to secure any supplies would be thirty days (RT 73), respondent did not hire any additional employees until October 8, 1964, at a point when its labor force had fallen to sixty-eight employees—three less than at the end of the strike on August 18.

Petitioner's only support for its argument that the jobs had not been filled, abolished, or absorbed with responses by officers of respondent to questions of the representative of the General Counsel to the effect that respondent intended "at sometime in the future" to increase production to twenty units per week:

> "Q But it was your intention to go back to twenty a week at some future time?
> "A Yes." (RT 72.)
> "Q And you did intend at all times to get production as quick as possible up to 20 trailers a week?
> "A Correct." (RT 111.)

But such an intent directed to the future is not determinative of the question of whether or not the jobs had been abolished, tested as of the date when the strikers applied for work, two days after the strike ended. Whatever its intent, respondent did not increase its work force until two months after the strike ended, and did not attain the pre-strike level of production until five months after the strike.[1] In light of these circumstances we do not find

[1] In *Atlas Storage Division*, 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team, & H., etc.* v. *N.L.R.B.*, 233 F.2d 233 (7th

[fol. 158] that the General Counsel has established that the jobs of complainants had not been absorbed or that they were still available. Rather, we believe that the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated.

Having found that the General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a whole, we find it unnecessary to consider the effect of the nonpreferential rehiring agreement entered into between the respondent and the union. Whether that agreement excused respondent from rehiring the strikers even if their jobs had not been absorbed, as contended by respondent, or was insufficient to waive the employees' rights guaranteed them by the NLRA, or whether such rights could not be waived, as contended by petitioner, is not before us, and we express no opinion thereon.

Enforcement of the order is denied.

POPE, Circuit Judge, concurring:

I concur. I think it helpful to note just what the Board decided in *Brown and Root, Inc., etc.*, 132 NLRB 486, 493 (1961). It there held that the employer has no obligation to seek out or to prefer economic strikers for vacancies which opened up after their applications. The Board in that case cited *Atlas Storage Division*, 112 NLRB 1175, enforced, 233 F.2d 233, 237-238 (7th Cir.) which held that a company has no duty to seek out an economic striker when no vacancy existed at the time of his request to return to work, but rather opened up later. The Board in the later case went on to say that the em-

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Cir. 1956), the Board and court found that a striker's job had been absorbed and he was thus not entitled to preferential reinstatement when a job opening occurred only three days after he had made application for reinstatement. In *N.L.R.B.* v. *Roure-Dupont Mfg.*, 199 F.2d 631 (2d Cir. 1952), the court found the strikers' jobs had been absorbed when vacancies occurred one month after the strike ended. Obviously, here there was a longer period of time.

ployer's duty was merely to refrain from discriminating against the striker should he request employment again.

Plainly the holdings in those cases precisely fit the question raised here. When these complaining employees applied for re-employment on August 20th, 1964, there was no vacancy. Some of them reapplied later, but there is no proof that any vacancies existed at those times either. Under the rule of the above cases, the employer owed no duty to seek out or prefer these strikers for the positions that opened between October 8th and October 16th, 1964. [fol. 159] The examiner wholly disregarded these earlier rulings, saying "The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired." That was an incorrect statement.

I do not question the right or power of the Board to change its rules from time to time. But when the employer here hired these six new employees, it did exactly what the Board had held it had the right to do. To change its declared policy, and make the change apply retroactively to the respondent's acts which were entirely proper when performed was arbitrary, capricious and an abuse of discretion—the sort of thing the Administrative Procedure Act, Title 5, § 1009(e), directs us to set aside. In *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F.2d 141, 149 (9th Cir.), we said

> We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

ELY, Circuit Judge, Dissenting:

I do not agree with the result reached in the majority opinion, and I cannot accept the reasoning which produces it.

When a workman chooses to join his fellows in an economic strike he takes certain risks. Among these is the risk that he may be unable to regain his position after the strike if another workman has permanently replaced him. *E.g., NLRB* v. *Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46, 82 L. Ed. 1381, 58 Sup. Ct. 904 (1938). There were no permanent replacements in the jobs in question here, but it is said that the striking employees lost their preferential status because their jobs were "abolished" or their work was "absorbed" by other employees. This I cannot see. Before the strike, there were [fol. 160] about one-hundred-ten employees. When the strike ended the number had decreased to seventy-one. It is undisputed that the employer always held the intent to resume full production as quickly as possible following the termination of the strike and, with the same haste, to return to the full complement of its prestrike labor force.

When the strike was terminated, the six employees here involved, almost immediately, made applications for reinstatement into their positions. The majority holds that these applications were ineffective because the employer did not yet, at the very time the applications were received, have the jobs available. In the light of the employer's expressed intention to fill the positions "as quickly as possible", this holding cannot, I submit, be justified. I would hold that reinstatement applications of economic strikers should continue in operative effect until the time when the normal course of resumed production creates the necessity to accomplish the intended reopening of jobs which have remained unabolished and not permanently absorbed and in which there have not been permanent replacements.

No other persons had replaced the striking workmen in the jobs which they had held before the strike and which they resought after the economic differences had been adjusted. Their jobs had not been "abolished", for "abolish" means "to do away with wholly" or "to destroy complete-

ly". The fact that the challenged hirings were made within about six weeks after the strike had terminated should conclusively establish that the work of at least three jobs [1] had not been permanently "absorbed" by others. If a striking workman should not be denied his preferential rights unless there has been a permanent replacement, then he should not be denied those rights unless there has been complete abolition of his job or permanent absorption of his work by others. There was no such permanence here.

The Board has made factual determinations, which, if supported by substantial evidence, we are obliged to uphold. 29 U.S.C. § 160(e); *NLRB* v. *Mrs. Fay's Pies*, 341 F.2d 489, 492 (9th Cir. 1965). As I see the evidence, it is so substantial in its support that the Board's decision, in its principal thrust, was compelled.

[fol. 161] I believe that my Brothers misapply the decisions in two cases, the facts in neither of which I can see as being analogous to those before us. One, *Chauffeurs Local 200* v. *NLRB*, 233 F.2d 233 (7th Cir. 1956), enforcing the order in *Atlas Storage Division*, 112 N.L.R.B. 1175 (1955), dealt with a job wherein the work of the economic striker who formerly occupied it had been permanently absorbed. It was held that the striker was not entitled to reinstatement in a job which the employer, for economic reasons, had abolished or the work of which had been absorbed. The court held that so long as the employer did not discriminate against the striker in rehiring, it had no obligation to seek him out. The striker sought to replace an employee who had been injured. The job was not, as were those here, one which had become available as the employer followed the course of expressed intention to rebuild its labor force and production to the prestrike level. There is no indication in the cited opinion that the employer intended to or actually did resume its prestrike labor force, and the court in no way indicated that it would approach the two situations in a similar manner.

The second case involved economic strikers who had been permanently replaced during a strike. *Brown and*

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[1] See footnote 2, *infra*.

Root, Inc., 132 N.L.R.B. 486, 493 (1961). The number of the replacements exceeded the number of striking workers. These are significant facts, and they are contrary to the facts in the case at bar. When, in *Brown and Root*, the Board wrote, "In the circumstances of this case, we hold that [the employers] had no obligation to seek out or prefer the [economic] strikers for vacancies which opened up after their application. . . .", its remarks were clearly directed to the facts before it. Inasmuch as the labor force in *Brown and Root, Inc.* exceeded the prestrike number at the time of the strikers' applications for reinstatement, it seems undeniable that the vacancies occurred because of the need to replace workmen who had already permanently replaced the striking workmen.

If I have properly distinguished the cited cases from the present case, as I believe I have, the majority's direct and rather severe criticism of the Board is unjustified.

The right to strike is a precious right. It is, too often, the workman's only weapon and his only shield against oppression. The majority opinion can have no other effect [fol. 162] than to intimidate those who believe themselves to be economically aggrieved, especially those who, for long tenure, have earned valuable benefits which they should not be required to expose to new risks, judicially created or enlarged by an inferior tribunal. It seems to me that our court now imposes an unnecessarily restrictive impairment upon the free and lawful exercise of a laborer's will.

I would enforce the order of the Board.[2]

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[2] The majority opinion reveals that when the reinstatement applications were made, there was a labor force of seventy-one and that when the October hirings occurred the number had decreased to sixty-eight. Therefore, as to the six hirings of that time, three of the available jobs might be found to be of the same nature as those in *Brown and Root, Inc., supra, i.e.*, jobs vacated by three permanent replacements. If this were true, then I would not, of course, enforce the order, as written, in its entirety.

If the views expressed in my dissenting opinion had been shared by one of my Brothers it would then have been necessary to face, four-square, the effect of the nonpreferential hiring agreement between the union and the employer. No present purpose could be served by an indication of my opinion on this question.

[fol. 163]

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,511

[File Endorsement Omitted]

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC., RESPONDENT

DECREE—Filed September 8, 1966

BEFORE: POPE, BARNES and ELY, Circuit Judges:

This cause came on to be heard upon the petition of the National Labor Relations Board, filed November 12, 1965, to enforce an order of the National Labor Relations Board issued by it on June 24, 1965, against the Fleetwood Trailer Company, Inc., Riverside, California, its officers, agents, successors and assigns.

This Court heard argument of respective counsel on June 8, 1966, and has considered the briefs and transcript of record filed in this cause. On September 8, 1966, the Court being fully advised in the premises handed down its decision; in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the enforcement of the order of the Board be and hereby is denied.

[fol. 164]

[Clerk's Certificate to foregoing transcript omitted in printing]

[fol. 165]

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI—December 8, 1966

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above entitled cause be, and the same is hereby, extended to and including Feb. 5, 1967

/s/ Wm. O. Douglas
Associate Justice of the Supreme
Court of the United States

Dated this 8th
day of December, 1966

[fol. 166]

SUPREME COURT OF THE UNITED STATES

No. 1036, October Term, 1966

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC.

ORDER ALLOWING CERTIORARI—April 10, 1967

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1967 264066 917

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CITATIONS

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Statute:

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ——

[redacted]TIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the National Labor Relations Board, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the Ninth Circuit entered in this case on September 8, 1966.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, pp. 13–24) is reported at 366 F. 2d 126. The findings of fact, conclusions of law, and order of the National Labor Relations Board (App. B, *infra*, pp. 26–37) are reported at 153 NLRB 425.

JURISDICTION

The decree of the court of appeals was entered on September 8, 1966 (App. A, *infra*, p. 25). By order dated December 8, 1966, Mr. Justice Douglas extended

the time for filing a petition for a writ of certiorari to and including Sunday, February 5, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

On the day a strike ended, the employer announced that, because of a reduction in production caused by the strike, no jobs were available. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new workers, even though there were strikers who had continually made known their desires to return to work. The question presented is whether the employer violated Section 8(a) (1) and (3) of the National Labor Relations Act by thus preferring new workers over the returning striking employees.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth in Appendix C. *infra*, pp. 38–39.

STATEMENT

A. THE BOARD'S FINDINGS OF FACT

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week (App. B, *infra*, p. 30; Tr. 75, 98–99, 101, 103–104, 108, 122, Res. Exh. 2).[2] On the following day, as a

[1] All dates hereinafter are in 1964.

[2] "Tr." refers to the stenographic transcript of the unfair labor practice hearing, "G.C. Exh." refers to the NLRB General Counsel's exhibits, and "Res. Exh." refers to the re-

result of a breakdown in collective bargaining negotiations between the Company and the Union,[3] about half of the employees struck in support of their contract demands (App. B, *infra*, p. 29; Tr. 100, 122). Because of the strike, the Company cut back its production schedule to ten units per week and reduced orders for materials accordingly (App. B, *infra*, p. 30; Tr. 73, 76, 101–102, Res. Exh. 2).

By August 18, the Company had hired about 20 new employees and some strikers had returned to work, so that its work force had increased to 71 (App. B, *infra*, p. 29; Tr. 76, 102, 122, G.C. Exh. 11). On that date, the Union ended the strike, accepted the Company's last contract offer, and requested reinstatement of the remaining strikers (App. B, *infra*, p. 29; Tr. 63–66). Although the Company intended to return to its prestrike production level as quickly as possible,[4] it explained to the Union that the cutback resulting from the strike prevented it from resuming full production and hence full employment immediately, and thus that it, at that time, was not hiring (App. B, *infra*, pp. 29, 30; Tr. 65–66, 72–73, 95, 102, 110–111). The Company refused to put the employees who had remained on strike on a preferential hiring list as requested by the Union. It offered to

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spondent Company's exhibits. These documents, together with "Volume 1, Pleadings," comprised the record in the court of appeals, and certified copies thereof have been filed with the petition.

[3] San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

[4] This goal was obtained by about December 13 (App. B, *infra*, p. 30; Tr. 104, Res. Exh. 2).

consider them for openings on a non-discriminatory basis if they made applications for employment and kept them current, but emphasized that the Company would be free to hire from any source (App. B, *infra,* p. 29; Tr. 66, 71, 94–95).

On August 20, six strikers applied for reemployment (App. B, *infra,* p. 29; G.C. Exh. 2–9). None of the employees hired during the strike were specific replacements for these particular strikers (App. B, *infra,* p. 31; G.C. Exh. 11, Tr. 123–124). Between October 8 and 16, the Company hired six employees, who had not previously worked for it, for jobs which the striker-applicants were qualified to fill; none of these jobs was first offered to the striker-applicants (App. B, *infra,* pp. 29, 30–34; Tr. 5–6, 80–84, 105–108, 111). The six striker-applicants were reemployed between November 2 and December 14 (App. B, *infra,* p. 30).

B. THE BOARD'S DECISION AND ORDER

The Board, adopting the examiner's decision, found that, when the six strikers applied for reemployment at the end of the strike in August, they had not been permanently replaced, since no one had been hired to fill their particular jobs. The Board further found that the lack of immediate openings at that time "was a temporary condition which the * * * [Company] knew would change and intended to change" by "return[ing] to full production and to a full crew as soon as practicable." (App. B, *infra,* p. 31.) The Board concluded that, in these circumstances, the strikers were entitled to reinstatement as work became available, in preference to new applicants for employment;

and that the Company, by treating them as though their employment status had terminated, had interfered with and discriminated against them because of their strike activity, in violation of Section 8(a) (1) and (3) of the Act (App. B, *infra*, pp. 34, 35). The Board ordered the Company to cease and desist from the unfair labor practices found and to reimburse the strikers for any loss of earnings attributable to the Company's failure to reinstate them at the time of the October hirings (App. B, *infra*, pp. 26–27, 35–36).

C. THE DECISION OF THE COURT OF APPEALS

The court of appeals, one judge dissenting, refused to enforce the Board's order. Holding that the right of an economic striker to reinstatement in his job must be determined on the basis of conditions which exist on the very day that he first offers to return to work, the court concluded that, since the jobs of the striker-applicants were unavailable on August 20, when they had applied for reemployment, the Company was not obliged to accord them a preference over new employees when jobs later became available (App. A, *infra*, pp. 17–19, 19–20.)

Judge Ely, dissenting, would have enforced the Board's order. In his view, since the Company admittedly intended to return to its pre-strike level of production and work force as soon as possible, the jobs of the striker-applicants could not properly be treated as having been "abolished," so as to terminate the reinstatement rights of the strikers (App. A, *infra*, pp. 21–22). The holding of the court, he concluded, unduly enlarged the risks imposed on em-

ployees who strike in support of their economic demands, and "can have no other effect than to intimidate" them in the exercise of this "precious right" (App. A, *infra*, p. 24).

REASONS FOR GRANTING THE WRIT

Like *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, No. 781, this Term (certiorari granted January 9, 1967), this case involves the right of employees to strike in support of contract demands without fear of being discriminated against because of their concerted activity.[5] As in *Great Dane*, the decision of the court of appeals here cannot be reconciled with the "repeated solicitude" Congress has shown for the right to strike and the "generous interpretation" that right is to be accorded. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233, 235. Thus, although the employees affected in this particular case were eventually rehired by the Company,[6] we seek certiorari because the de-

[5] The question presented in *Great Dane* is whether the employer's conduct—the awarding of accrued vacation pay to some and denial of it to others following a strike—may properly be held to violate Section 8(a)(1) and (3), absent specific evidence of the employer's subjective intent to discriminate against the strikers. (We urge that it may.) Here, the Board found specifically that the employer had no "conscious purpose to discriminate against the strikers * * *" (App. B, *infra*, p. 33). The issues in the two cases are therefore presented in similar factual contexts.

[6] Although the strikers were eventually rehired, their interest is not inconsequential. Not only were they awarded back pay, but also the Board's order would protect them from being discharged, in the event of a general lay-off, prior to those new workers the Company had hired in preference to them. See note 9, *infra*.

cision below—that the employment status of an economic striker is terminated if, on the day he seeks to return to work, the employer is not hiring because of a temporary cutback in production caused by the strike—would, if allowed to stand, create additional and unwarranted risks upon the right to strike.

1. Sections 7 and 13 of the Act guarantee employees the right to strike, and Section 2(3) further safeguards the assertion of that right by preserving to strikers their status as employees under the Act. Accordingly, an employer who refuses to reinstate economic strikers upon termination of a strike necessarily impinges upon his employees' free exercise of "concerted activities for the purpose of collective bargaining * * *" (Section 7). Not every such impingement on Section 7 rights, however, constitutes an unfair labor practice under Section 8(a) (1) and (3); an employer's legitimate business interests may, in some limited circumstances, outweigh the interests of his employees. See *National Labor Relations Board* v. *Erie Resistor Corp., supra,* 373 U.S. at 228–229, 333.

Thus, in the interest of maintaining operations notwithstanding a strike, an employer may hire permanent replacements during a strike; he is not obliged to create positions thereafter for economic strikers by discharging those replacements when the strike has ended. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.,* 304 U.S. 333, 345–346.[7]

[7] We do not discuss the right to reinstatement in the context of an unfair labor practice—as opposed to economic—strike. It may be noted generally, however, that if a strike was caused

Similarly, he need not create new positions for strikers whose jobs were permanently abolished, during the period of a strike, for independent business reasons. *Atlas Storage Division,* 112 NLRB 1175, 1179–1180, enforced *sub nom. Chauffeurs Local 200* v. *National Labor Relations Board,* 233 F. 2d 233, 238 (C.A. 7); *Arthur H. Sumner,* 109 NLRB 234. In contrast, should replacement be of a temporary or makeshift nature, economic strikers are entitled to reinstatement. *Firth Carpet Co.* v. *National Labor Relations Board,* 129 F. 2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *Marydale Products Co.,* 311 F. 2d 890, 891–892 (C.A. 5), certiorari denied, 375 U.S. 817.

The court below, in treating temporary job unavailability as the equivalent of job abolition, departed from these settled principles. It reasoned that whether or not a striker's former job had been eliminated is "to be determined on the date on which the striker makes his offer to return to work" (Appendix A, *infra,* p. 17; also, pp. 17–18).[8] Upon that narrow and technical basis, the court went on to conclude that, since no jobs were available when the strikers first sought to return to work on August 20, they were

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by an employer's unfair labor practices, the employer must reinstate strikers, despite any replacements he may have hired (see *e.g., National Labor Relations Board* v. *Remington Rand, Inc.,* 130 F. 2d 919, 927–928 (C.A. 2)), and, on the other hand, that strikers who engage in serious misconduct may, in some circumstances, lose their reinstatement rights.

[8] The court purported to rely upon a Board decision for the quoted proposition. That decision (*Brown and Root, Inc.,* 132 NLRB 486, 493), is clearly inapposite, as the Board and the dissenting judge held. See text, *infra,* pp. 10–11.

properly denied reinstatement between October 8 and 16, when the Company hired, in preference to them, six new employees—notwithstanding that levels of production and work force had been curtailed only because of the strike, that at all times the company intended to resume those levels as quickly as possible, and that the strikers had indicated their continuing desire to return to work by reporting periodically.[9]

But, the object of any strike is to exert pressure upon the employer by lessening his ability to carry on operations. If a strike is at all successful, it is likely that the normal complement of jobs and the production level will be curtailed somewhat when the strike is terminated and the strikers seek to return to work. Hence, if such temporary job unavailability is sufficient to deprive strikers of the right to subsequent reinstatement, the right to strike itself would be significantly weakened, since such possible loss of reinstatement rights inevitably would deter many employees from striking (see *infra*, p. 11). Cf. *National Labor Relations Board* v. *Burnup & Sims, Inc.*, 379 U.S. 21, 23–24. Indeed, the risk incurred by the strikers would increase, anomalously, in proportion to the effectiveness of their concerted action, *i.e.*, the more effective the strike in curtailing the employer's opera-

[9] The Company contended below that the Union had agreed to a non-preferential hiring list. The court of appeals did not reach the issue (App. A, *infra*, pp. 19, 24 n. 2). The Board found that the Union "had bowed to the [Company] decision" to adopt a non-preferential hiring plan (App. B, infra, p. 29 n. 3), *i.e.*, that, under the circumstances, this accession could not in any way be viewed as an effective waiver of the employees' rights to reinstatement (see, *e.g. Electrical Workers Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 726–727 (C.A. 3)).

tions, the fewer the jobs available to the striking employees who seek to return to work.

2. There is no overriding employer interest which would justify the impingement upon the right to strike sanctioned by the court below. Certainly the rationale underlying the employer's right to replace workers during a strike—the need for personnel "to carry on the business" (*Mackay, supra,* 304 U.S. at 345)—cannot be utilized to support the hiring of others in preference to strikers after the strike has ended. Thus, should the employer's production be temporarily diminished, he need not reemploy strikers on the precise date they first seek to return to work. But there is no valid reason why that temporary reduction should transform the protected status of an economic striker to that of a non-employee, with consequent loss of seniority and other accrued rights.[10]

3. The court below relied upon several decisions of the Board to support its holding (App. A, *infra,* pp. 17–18; 19–20). However, as the dissenting judge pointed out (*id.* at pp. 23–24), those decisions are inapposite. Thus, in *Atlas Storage, supra,* 112 NLRB at 1179–1180, the Board had found that the striker's job had been eliminated for economic reasons, the employer having lost business (independent of the strike).

[10] We note, at this point, the Board's statement that "all [six] of the affected individuals have been rehired and there is no claim that they were not fully reinstated." (Appendix B, *infra,* pp. 34–35). That statement was made in discussing the remedy necessary to cure the violations found, and the Board was not suggesting that the rehiring of the employees gave them the full measure of security they had enjoyed before the strike. Presumably, if the decision below stands, the Company would be free to discharge the six in an economic layoff prior to the new employees it had earlier hired.

And in *Brown and Root, Inc., supra,* 132 NLRB at 493–494, the Board found that the striker had been permanently replaced. Moreover, in both of those cases the issue was whether the employer need seek out strikers when vacancies arose after the strikers' applications for reinstatement were received. Here, however, not only had the strikers made known that they were continually available and had periodically reapplied, but also it cannot be said that the jobs for which the Company hired six new workers in October were vacancies later arising. Rather, as the Board found, the strikers' jobs here were merely temporarily unavailable; production was down solely because of the strike, and it was certain that there would be openings because the Company intended to increase production to its pre-strike level as quickly as possible. See *Philanz Oldsmobile, Inc.,* 137 NLRB 867, 871.

4. By engrafting an unwarranted limitation on the rights of economic strikers, the court below has imposed a new risk on employees in an important area of the labor laws. As we have shown above, it has heretofore been held that an economic striker subjects himself only to the risk of permanent replacement or permanent job abolition. If the decision below is allowed to stand, employees may well fear that, if they engage in an economic strike, they must also expose themselves to the further risk of losing their employment status if the strike results in a temporary cutback in production. The decision below is likely to deter employees from exercising their most substantial economic weapon. Review is therefore warranted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

THURGOOD MARSHALL,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
DOMINICK L. MANOLI,
Associate General Counsel,
NORTON J. COME,
Assistant General Counsel,
MALCOLM D. SCHULTZ,
Attorney,
National Labor Relations Board.

FEBRUARY 1967.

APPENDIX A

United States Court of Appeals for the Ninth Circuit

No. 20,511

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC., RESPONDENT

(September 8, 1966)

ON PETITION FOR ENFORCEMENT OF AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD

Before POPE, BARNES and ELY, *Circuit Judges.*

BARNES, *Circuit Judge*: This is a petition for the enforcement of an order of the National Labor Relations Board. It had jurisdiction of the unfair labor practice complaint alleged in this case pursuant to 29 U.S.C. § 160(a)(b). This court has jurisdiction of this petition pursuant to 29 U.S.C. § 160(e).

Respondent is engaged in the manufacture of house trailers at Riverside, California. Respondent's employees are represented by the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO. At the beginning of August 1964, respondent employed approximately one hundred and ten persons and was producing twenty mobile homes per week.

In late 1964 respondent was engaged in negotiations for a collective bargaining agreement with the union.

On August 6, 1964, a number of respondent's production workers went on strike in support of their contract demands. Approximately one-half of respondent's employees either did not go on strike, or crossed the picket lines to return to work within a few days. Respondent immediately began to hire replacements for those who did strike and by August 18, 1964 had hired twenty-one new employees.

On August 18, 1964, the union agreed to end the strike and to accept respondent's last contract offer. The parties agreed that the strikers would not be put on a preferential hiring list but would be considered on a nondiscriminatory basis if they applied for employment. At the conclusion of the strike respondent did not return to its full pre-strike production force but determined to continue production with the crew of seventy-one which it had at the end of the strike. The six employees or former employees who are the complaining parties in these proceedings applied for employment on August 20, 1964. Between October 8 and October 16, 1964, respondent hired six new employees and passed over the strikers in doing so. The strikers were not rehired until December 1964.

On September 10, 1964 (before any hiring or any "passing over"), the complaining former employees filed a complaint with the NLRB. An amended complaint was filed in November 1964. Hearings were had before Trial Examiner Wallace E. Royster on February 17, 1965, and on April 16, 1965 the trial examiner filed his decision. In it he found that respondent had committed an unfair labor practice by treating its former employees as applicants for new employment without any employee status, in violation of section 8(a) (1) and (3) of the National Labor Relations Act. On June 24, 1965, a three mem-

ber panel of the NLRB (Fanning, Brown, Jenkins) adopted the decision and recommendations of the trial examiner. This petition by the NLRB for enforcement of its order followed.

We first note that it is undisputed that there was in this case no conscious intent on the part of the employer to discriminate. The trial examiner so found, and the Board affirmed. With this in mind, we turn to specific facts.

The main issue at dispute in these proceedings is whether or not the complaining strikers had been replaced or their jobs absorbed while they were on strike. If their jobs had not been filled or eliminated due to a decrease in production, the strikers were entitled to be treated as employees and to be given preference over other job applicants.

Section 8(a) (1) and (3) of the NLRA which respondent is alleged to have violated in hiring new applicants before rehiring the six complaining strikers provides:

> § 8. Unfair Labor Practices.
>
> (a) It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> * * * * *
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

The leading case interpreting this section held that the employer has a duty to reinstate those strikers who had not been permanently replaced, but need not re-

move replacements to reinstate the strikers. *N.L.R.B.* v. *Mackay Co.*, 304 U.S. 333 (1938).

The disagreement in the present proceedings centers on whether the jobs of the six complaining strikers had been filled so as to remove the requirement on respondent to rehire them on a preferential basis. Respondent contends that it cut back its labor force and production plans during and following the strike, and that as a result, the jobs of the strikers were either abolished or absorbed by other employees; and that such abolition or absorption amounts to replacement. Petitioner, on the other hand, contends that respondent intended to return to pre-strike production levels as soon as possible and that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall within the foreseeable future.

Respondent's contention that the abolition or absorption of a job is equivalent to replacement is a correct statement of the law. *Atlas Storage Division*, 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team, & H., etc.* v. *N.L.R.B.*, 233 F. 2d 233 (7th Cir. 1956). It remains to be seen whether respondent's factual view of the case, or that of petitioner, is supportable. But before passing to an examination of that question, we first desire to deal with petitioner's legal contention that an employee who has been laid off retains his status as an employee and his right to preferential rehiring as long as he has a reasonable expectation of recall to work within the foreseeable future. In support of this position petitioner cites *Servel, Inc.*, 65 NLRB 1067 (1946); *Hubbard & Co.*, 45 NLRB 1 (1942); *Drayer-Hanson Incorporated*, 86 NLRB 111 (1949); *Glenn I. Martin Co.*, 74 NLRB 546 (1947); *General Motors Corp.*, 113

NLRB 876 (1955); *Lima Hamilton Corp.*, 87 NLRB 455 (1949). All of these cases deal with the question of whether employees who had been laid off, but who (it was contended) would probably be recalled in the foreseeable future, *should be permitted to vote in a representation election.* To our knowledge the National Labor Relations Board has never applied this "reasonable expectation of recall within the foreseeable future" as a test to determine whether or not a striker has been replaced. And we are not inclined to do so. Many of these cases make it clear that the policy is based on the theory that employees who are quite certain to be recalled should be given a voice in selecting the bargaining agent who will represent them. Such an element does not here exist. An examination of the facts of the individual case seems preferable where the question is one of whether an employer has committed an unfair labor practice.

Turning to the factual merits of respondent's contention that the jobs of the complaining strikers had been absorbed or abolished as a result of reduced production following the strike, we are met at the outset with the existence of a Board decision laying down the rule that the question of whether or not a striker has been replaced is to be determined on the date on which the striker makes his offer to return to work. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493 (1961). The trial examiner referred to this case and held that it was not controlling, without discussing why it was not controlling. (CT 13.) We cannot agree with the trial examiner. We find it difficult to approve the Board's cavalier use of precedent when it desires to follow it, and the disregard of it when it wishes to achieve a different result. On the basis of the Board's own policy as stated in *Brown and Root, supra,* we hold that whether or not a vacancy

exists must be determined at the time the strikers apply for work after the strike.

Tested by this standard the record in these proceedings is devoid of any evidence to establish that the jobs of the six complaining strikers were still available on August 20, 1964, when they applied for reinstatement. The respondent had made a decision during the strike to curtail production. The work force at the end of the strike numbered seventy-one employees, and despite the testimony of the administrative vice-president of respondent that the longest it would take to secure any supplies would be thirty days (RT 73), respondent did not hire any additional employees until October 8, 1964, at a point when its labor force had fallen to sixty-eight employees—three less than at the end of the strike on August 18.

Petitioner's only support for its argument that the jobs had not been filled, abolished, or absorbed with responses by officers of respondent to questions of the representative of the General Counsel to the effect that respondent intended "at sometime in the future" to increase production to twenty units per week:

> Q. But it was your intention to go back to twenty a week at some future time?
> A. Yes. (RT 72.)
> Q. And you did intend at all times to get production as quick as possible up to 20 trailers a week?
> A. Correct. (RT 111.)

But such an intent directed to the future is not determinative of the question of whether or not the jobs had been abolished, tested as of the date when the strikers applied for work, two days after the strike ended. Whatever its intent, respondent did not increase its work force until two months after the strike ended, and did not attain the pre-strike level of pro-

duction until five months after the strike.[1] In light of these circumstances we do not find that the General Counsel has established that the jobs of complainants had not been absorbed or that they were still available. Rather, we believe that the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated.

Having found that the General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a whole, we find it unnecessary to consider the effect of the nonpreferential rehiring agreement entered into between the respondent and the union. Whether that agreement excused respondent from rehiring the strikers even if their jobs had not been absorbed, as contended by respondent, or was insufficient to waive the employees' rights guaranteed them by the NLRA, or whether such rights could not be waived, as contended by petitioner, is not before us, and we express no opinion thereon.

Enforcement of the order is denied.

POPE, *Circuit Judge,* concurring: I concur. I think it helpful to note just what the Board decided in *Brown and Root, Inc., etc.,* 132 NLRB 486, 493 (1961). It there held that the employer has no obligation to seek out or to prefer economic strikers for vacancies which opened up after their applications.

[1] In *Atlas Storage Division,* 112 NLRB 1175 (1955), enforced sub nom. *Chauffeurs, Team. & H., etc.* v. *N.L.R.B.,* 233 F. 2d 233 (7th Cir. 1956), the Board and court found that a striker's job had been absorbed and he was thus not entitled to preferential reinstatement when a job opening occurred only three days after he had made application for reinstatement. In *N.L.R.B.* v. *Roure-Dupont Mfg.,* 199 F. 2d 631 (2d Cir. 1952), the court found the strikers' jobs had been absorbed when vacancies occurred one month after the strike ended. Obviously, here there was a longer period of time.

The Board in that case cited *Atlas Storage Division*, 112 NLRB 1175, enforced, 233 F. 2d 233, 237–238 (7th Cir.) which held that a company has no duty to seek out an economic striker when no vacancy existed at the time of his request to return to work, but rather opened up later. The Board in the later case went on to say that the employer's duty was merely to refrain from discriminating against the striker should he request employment again.

Plainly the holdings in those cases precisely fit the question raised here. When these complaining employees applied for reemployment on August 20th, 1964, there was no vacancy. Some of them reapplied later, but there is no proof that any vacancies existed at those times either. Under the rule of the above cases, the employer owed no duty to seek out or prefer these strikers for the positions that opened between October 8th and October 16th, 1964.

The examiner wholly disregarded these earlier rulings, saying "The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired." That was an incorrect statement.

I do not question the right or power of the Board to change its rules from time to time. But when the employer here hired these six new employees, it did exactly what the Board had held it had the right to do. To change its declared policy, and make the change apply retroactively to the respondent's acts which were entirely proper when performed was arbitrary, capricious and an abuse of discretion—the sort of thing the Administrative Procedure Act, Title 5, § 1009(e), directs us to set aside. In *National Labor Relations Board* v. *Guy F. Atkinson Co.*, 195 F. 2d 141, 149 (9th Cir.), we said

> We think it apparent that the practical operation of the Board's change of policy, when incorporated in the order now before us, is to work hardship upon respondent altogether out of proportion to the public ends to be accomplished. The inequity of such an impact of retroactive policy making upon a respondent innocent of any conscious violation of the act, and who was unable to know, when it acted, that it was guilty of any conduct of which the Board would take cognizance, is manifest. It is the sort of thing our system of law abhors.

ELY, *Circuit Judge,* Dissenting: I do not agree with the result reached in the majority opinion, and I cannot accept the reasoning which produces it.

When a workman chooses to join his fellows in an economic strike he takes certain risks. Among these is the risk that he may be unable to regain his position after the strike if another workman has permanently replaced him. *E.g., NLRB* v. *Mackay Radio & Tel. Co.,* 304 U.S. 333, 345–46, 82 L. Ed. 1381, 58 Sup. Ct. 904 (1938). There were no permanent replacements in the jobs in question here, but it is said that the striking employees lost their preferential status because their jobs were "abolished" or their work was "absorbed" by other employees. This I cannot see. Before the strike, there were about one-hundred-ten employees. When the strike ended the number had decreased to seventy-one. It is undisputed that the employer always held the intent to resume full production as quickly as possible following the termination of the strike and, with the same haste, to return to the full complement of its prestrike labor force.

When the strike was terminated, the six employees here involved, almost immediately, made applications for reinstatement into their positions. The majority holds that these applications were ineffective

because the employer did not yet, at the very time the applications were received, have the jobs available. In the light of the employer's expressed intention to fill the positions "as quickly as possible", this holding cannot, I submit, be justified. I would hold that reinstatement applications of economic strikers should continue in operative effect until the time when the normal course of resumed production creates the necessity to accomplish the intended reopening of jobs which have remained unabolished and not permanently absorbed and in which there have not been permanent replacements.

No other persons had replaced the striking workmen in the jobs which they had held before the strike and which they resought after the economic differences had been adjusted. Their jobs had not been "abolished", for "abolish" means "to do away with wholly" or "to destroy completely". The fact that the challenged hirings were made within about six weeks after the strike had terminated should conclusively establish that the work of at least three jobs[1] had not been permanently "absorbed" by others. If a striking workman should not be denied his preferential rights unless there has been a permanent replacement, then he should not be denied those rights unless there has been complete abolition of his job or permanent absorption of his work by others. There was no such permanence here.

The Board has made factual determinations, which, if supported by substantial evidence, we are obliged to uphold. 29 U.S.C. § 160(e); *NLRB* v. *Mrs. Fay's Pies,* 341 F. 2d 489, 492 (9th Cir. 1965). As I see the evidence, it is so substantial in its support that the Board's decision, in its principal thrust, was compelled.

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[1] See footnote 2, *infra.*

I believe that my Brothers misapply the decisions in two cases, the facts in neither of which I can see as being analogous to those before us. One, *Chauffeurs Local 200* v. *NLRB*, 233 F. 2d 233 (7th Cir. 1956), enforcing the order in *Atlas Storage Division*, 112 N.L.R.B. 1175 (1955), dealt with a job wherein the work of the economic striker who formerly occupied it had been permanently absorbed. It was held that the striker was not entitled to reinstatement in a job which the employer, for economic reasons, had abolished or the work of which had been absorbed. The court held that so long as the employer did not discriminate against the striker in rehiring, it had no obligation to seek him out. The striker sought to replace an employee who had been injured. The job was not, as were those here, one which had become available as the employer followed the course of expressed intention to rebuild its labor force and production to the prestrike level. There is no indication in the cited opinion that the employer intended to or actually did resume its prestrike labor force, and the court in no way indicated that it would approach the two situations in a similar manner.

The second case involved economic strikers who had been permanently replaced during a strike. *Brown and Root, Inc.*, 132 N.L.R.B. 486, 493 (1961). The number of the replacements exceeded the number of striking workers. These are significant facts, and they are contrary to the facts in the case at bar. When, in *Brown and Root,* the Board wrote, "In the circumstances of this case, we hold that [the employers] had no obligation to seek out or prefer the [economic] strikers for vacancies which opened up after their application. * * *", its remarks were clearly directed to the facts before it. Inasmuch as the labor force in *Brown and Root, Inc.* exceeded the prestrike

number at the time of the strikers' applications for reinstatement, it seems undeniable that the vacancies occurred because of the need to replace workmen who had already permanently replaced the striking workmen.

If I have properly distinguished the cited cases from the present case, as I believe I have, the majority's direct and rather severe criticism of the Board is unjustified.

The right to strike is a precious right. It is, too often, the workman's only weapon and his only shield against oppression. The majority opinion can have no other effect than to intimidate those who believe themselves to be economically aggrieved, especially those who, for long tenure, have earned valuable benefits which they should not be required to expose to new risks, judicially created or enlarged by an inferior tribunal. It seems to me that our court now imposes an unnecessarily restrictive impairment upon the free and lawful exercise of a laborer's will.

I would enforce the order of the Board.[2]

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[2] The majority opinion reveals that when the reinstatement applications were made, there was a labor force of seventy-one and that when the October hirings occurred the number had decreased to sixty-eight. Therefore, as to the six hirings of that time, three of the available jobs might be found to be of the same nature as those in *Brown and Root, Inc.*, *supra*, *i.e.*, jobs vacated by three permanent replacements. If this were true, then I would not, of course, enforce the order, as written, in its entirety.

If the views expressed in my dissenting opinion had been shared by one of my Brothers it would then have been necessary to face, four-square, the effect of the nonpreferential hiring agreement between the union and the employer. No present purpose could be served by an indication of my opinion on this question.

In the United States Court of Appeals
for the Ninth Circuit

No. 20,511

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER COMPANY, INC., RESPONDENT

(Filed, September 8, 1966)

DECREE

Before POPE, BARNES AND ELY, *Circuit Judges.*

This cause came on to be heard upon the petition of the National Labor Relations Board, filed November 12, 1965, to enforce an order of the National Labor Relations Board issued by it on June 24, 1965, against the Fleetwood Trailer Company, Inc., Riverside, California, its officers, agents, successors and assigns.

This Court heard argument of respective counsel on June 8, 1966, and has considered the briefs and transcript of record filed in this cause. On September 8, 1966, the Court being fully advised in the premises handed down its decision; in conformity thereto, it is hereby

ORDERED, ADJUDGED AND DECREED by the United States Court of Appeals for the Ninth Circuit that the enforcement of the order of the Board be and hereby is denied.

APPENDIX B

United States of America, Before the National Labor Relations Board

FLEETWOOD TRAILER CO., INC., AND LIONEL RICHMAN

DECISION AND ORDER

On April 16, 1965, Trial Examiner Wallace E. Royster issued his Decision in the above-entitled proceeding, finding that Respondent had engaged in and was engaging in certain unfair labor practices within the meaning of the National Labor Relations Act, as amended, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the Respondent filed exceptions to the Decision and a supporting brief.

Pursuant to the provisions of Section 3(b) of the Act, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions and brief, and the entire record in this case, and hereby adopts the findings, conclusions, and recommendations of the Trial Examiner.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the Order

recommended by the Trial Examiner, and orders that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.[1]

Dated, Washington, D.C.

[SEAL]

JOHN H. FANNING,
GERALD A. BROWN,
HOWARD JENKINS, JR.,
Members,
National Labor Relations Board.

153 NLRB No. 43.

United States of America, before the National Labor Relations Board, Division of Trial Examiners, Branch Office, San Francisco, California

No. 21–CA–6160

FLEETWOOD TRAILER CO., INC., AND LIONEL RICHMAN

BRUCE H. BERRY, *Esq.*, of Los Angeles, Calif., for the General Counsel.

GIBSON, DUNN & CRUTCHER, by HUGH J. SCALLON, *Esq.*, of Beverly Hills, Calif., for the Respondent.

Before WALLACE E. ROYSTER, *Trial Examiner.*

TRIAL EXAMINER'S DECISION

STATEMENT OF THE CASE

This matter was tried before me in Los Angeles, California, on February 17, 1965.[1] At issue is wheth-

[1] The telephone number for Region 21, appearing at the bottom of the Appendix attached to the Trial Examiner's Decision, is amended to Read: Tel. No. 688–5229.

[1] Charge filed and served September 10, 1964. Complaint alleging violations of Section 8(a) (1) and (3) of the Act issued December 11, 1964.

er Fleetwood Trailer Co., herein the Respondent, since August 20, 1964,[2] has unlawfully discriminated against Mary Nevins, Lonny Painter, Luther Malzahn, James Fuller, David Davis and Ronald Kluth, by refusing to reemploy these individuals upon unconditional application following the termination of an economic strike.

Respondent, by its answer, asserts that these strikers had been permanently replaced prior to their applications and that no unfair labor practice was committed.

Upon the entire record in the case and from my observation of the witnesses, I make the following:

FINDINGS OF FACT

I. The business of the Respondent

The Respondent is a California corporation engaged at Riverside, California, in the manufacture of mobile homes. Annually, it receives goods valued at in excess of $50,000 from points outside the State of California, and sells and distributes products valued at more than that amount directly to points outside the State of California. It is conceded, and I find, that the Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

II. The labor organization involved

San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO, herein the Union, is a labor organization within the meaning of Section 2(5) of the Act.

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[2] All dates hereafter mentioned are in 1964.

III. The unfair labor practices

On August 6, in support of the Union's bargaining demands, Respondent's employees began a strike which ended on August 18. During this period, some of those on strike returned to work and some new workers were hired. At the conclusion of the strike the Respondent had 71 employees on its payroll. On August 18, the Respondent and the Union met with the result that the Union agreed to terminate the strike and accept Respondent's last contract offer. Attorney Jerome Byrne, the Respondent's representative, testified that on this occasion he told the Union representatives that the plant was not in need of employees and that no strikers could be given immediate employment. Byrne said that he would not put the strikers on a preferential hiring list but assured the Union that the Respondent would not discriminate in any way against them. Byrne said, in effect, that any striker who wished to return to work should make known his desire to the Respondent and renew his application at the expiration of succeeding 30-day periods if he maintained interest in returning to work. Byrne made it clear to the Union, he testified, that the Respondent would consult the list of striker applicants whenever a vacancy developed, but that the Respondent would feel free to hire from any source.[3] On August 20, the six individual strikers named earlier in this Decision applied for reemployment. Before any of them was reemployed the Respondent hired, in the period from October 8 through October 16, six individuals who had not previously been in Respondent's employ. It is the contention of the General Counsel that the six striker applicants should have been returned to work in these vacancies.

[3] The Union bowed to this decision.

Before the strike began the Respondent had a work force of sufficient size (about 108) so that it programmed the building of 20 mobile homes a week. When the strike began, the Respondent decided to cut this programming in half and cancelled or postponed deliveries of supplies and materials consistent with this decision. With the return of some of the strikers before August 18 and the employment of new workers, it was decided to attempt the production of about 15 trailers a week. At all times it was Respondent's intention to return to the full production of 20 trailers as soon as a sufficiently experienced work force was assembled and materials were at hand. This goal was reached about December 13.

Respondent contends that at the expiration of the strike, because it had then no need for additional employees, all of the strikers had been replaced, that in consequence they thereafter had no employment rights with the Respondent and were entitled to no more than a nondiscriminatory consideration of their applications for work. The position of the General Counsel is that the lack of need for additional workers on August 18 represented a temporary condition; that the striker applicants named herein had not then been replaced.

The six applicants visited the plant or telephoned the Respondent on a number of occasions on and after August 20. All were reemployed in the period from November 2 through December 14.

The position of the Respondent that all of the strikers had been replaced permanently before they offered to return to work is based upon the circumstance that on August 20 the Respondent had no immediate need for more employees. This circumstance is not challenged by the General Counsel and I find it satisfactorily to be established by the evidence. If it is true that the strikers had been per-

manently replaced, as the Respondent contends, then the six applicants named in the complaint had lost any right to reinstatement or preferential hiring. This is the status, in the view of the Respondent, that they occupied. Each was required to register his continued interest in employment with the Respondent every month and failure to do so was "disqualifying." Respondent did not however apply this rule strictly and called to the attention of a Union representative the fact that some had failed to register within the set period. When these tardy ones appeared at the plant they were permitted to regain their status as applicants. However, in my view of the case, none of the six had been permanently replaced when they offered to return to work. There is no evidence that any person was hired during the strike specifically to fill the job of any of them. The lack of job openings on August 20 was a temporary condition which the Respondent knew would change and intended to change. It was its purpose, later achieved, to return to full production and to a full crew as soon as practicable. I think it thus inaccurate to say that any of the applicants concerned here had lost his employment with the Respondent by reason of replacement.

The Board has held that employees who have not been permanently replaced before the end of a strike must be reinstated to their former positions as work becomes available and before new employees are hired. This holding is qualified only by the condition that a refusal to reinstate may be justified upon a showing by the employer that he acted upon nondiscriminatory considerations.[4] The Respondent has

[4] *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 871. *Brown and Root, Inc., etc.*, 132 NLRB 486, 493–494, arises in a different factual setting. I find that holding concerning the right of reinstatement of economic strikers to jobs not open at the time of application not controlling here.

undertaken to make that showing in respect to the six applicants.

The Respondent attempts to hire what it describes as willing workers, between the ages of 19 and 25, and with satisfactory employment histories. No particular experience is required.

The first hire after the end of the strike was of Eddie Latinsky as a cabinet assembler on October 8; the second, in the same classification, of Gilbert Herrara on October 12. Neither had worked at any earlier time for the Respondent and their qualifications for hire do not appear in the record. Of the six applicants named in the complaint, Malzahn, Kluth, Nevins and Fuller had worked in cabinet assembly before the strike. There is no testimony on the part of the Respondent to indicate why none of these (other than Fuller) was reinstated to the positions for which Latinsky and Herrara were hired.

Also on October 12 Jimmy Benson was hired as a flooring employee and Everett Leffen as a sidewall employee. Plant Manager Cecil B. Chapman testified that Kluth, Nevins and Malzahn were not physically capable of handling these jobs and that for the same reason none of the three was qualified to handle the job of cabinet assembler for which Billy Valk was hired on October 16. Chapman also testified that the job of finisher, for which a new employee Dwayne Nash was hired on October 13, was unsuited to Nevins because she could not perform all of its functions; that he preferred to have a younger man than Malzahn on that job; and that he had "serious doubt" that Kluth, because of impaired eyesight could handle it. The qualifications of none of the newly hired employees is mentioned in the record.

Chapman testified that none of the striker applicants was disqualified for these job opportunities

on the basis of their prior work records with "possibly one exception," Fuller. Chapman explained that Fuller was absent on a number of occasions but, more importantly, about a week before the strike began had engaged in a "small hassle" with his supervisor. The incident was reported to Chapman who considered that it "bordered on insubordination."

I note that no unfair labor practices are alleged other than in respect to bringing the striker applicants back to work and that, save for whatever inferences may be drawn from action or lack of action in that connection, no Union animus is alleged or shown. I am not convinced that the Respondent had a conscious purpose to discriminate against the strikers but I nonetheless find that it did so.

Basically, this discrimination consists in the Respondent's position that at the conclusion of the strike all strikers had been replaced. Thereafter, instead of treating those strikers who asked for reinstatement as their status required, the Respondent saw them only as applicants for employment who were entitled to no more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees. Their right to employment was not enhanced by reason of the strike but as long as they were not permanently replaced, neither was it diminished. It does not appear that the Respondent considered Latinsky and Herrara to be better qualified to work in cabinet assembly than Nevins, Melzahn, Fuller or Davis; or that Benson, Leffen, Nash and Valk were better qualified as workmen than Painter or Fuller or Davis. Nevins could not handle a job unsuited to a female, Kluth could not work where normal eyesight was a requirement and Malzahn was disqualified only to the extent that any man of his age (53) might have been. I find that the six job openings in October could have been filled by the

striker applicants and, had the Respondent considered them as employees rather than as mere applicants for hire, would have been so filled. This is so even though the Respondent had some reason for dissatisfaction with Fuller. The Respondent did not consider that he was disqualified for employment.

I find that by failing to return Lonny Painter, Luther Malzahn, David Davis, Mary Nevins, Ronald Kluth and James Fuller to employment when the October vacancies developed, the Respondent discriminated against these individuals because of participation in a lawful strike, thus discouraging membership in and activity on behalf of the Union. The Respondent has thereby engaged in unfair labor practices within the meaning of Section 8(a)(3) of the Act.

This conduct interfered with, restrained and coerced employees in the exrecise of rights guaranteed in Section 7 of the Act and, I find, the Respondent thereby engaged in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

IV. The effect of the unfair labor practices upon commerce

The actions of the Respondent described in Section III above, occurring in connection with its operations have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. The remedy

Having found that the Respondent has engaged in certain unfair labor practices, it will be recommended that it cease and desist therefrom and take certain affirmative action designed to effectuate the purposes of the Act. All of the affected individuals have been rehired and there is no claim that they were not fully

reinstated. The Respondent shall make each whole for any loss of earnings attributable to the failure on the part of the Respondent to return them to employment in the period from October 8 through October 16. This loss shall be computed in the manner prescribed by the Board in *F. W. Woolworth Company,* 90 NLRB 289, and shall bear interest at the rate of 6 percent per annum computed quarterly.

On the basis of the foregoing findings of fact and upon the entire record in the case, I make the following:

CONCLUSIONS OF LAW

1. The Union is a labor organization within the meaning of Section 2(5) of the Act.

2. The Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce or in an operation affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

3. By failing to return Painter, Matzahn, Davis, Nevins, Kluth and Fuller to employment in October 1964, the Respondent has engaged in unfair labor practices within the meaning of Section 8(a) (1) and (3) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2 (6) and (7) of the Act.

RECOMMENDED ORDER

Upon the foregoing findings of fact and conclusions of law, and upon the entire record in the case, the undersigned recommends that Fleetwood Trailer Co., Inc., Riverside, California, its officers, agents, successors, and assigns, shall:

1. Cease and desist from—

(a) discouraging membership in or lawful strike activity in behalf of any labor organization

by discrimination in regard to hire or tenure of employment or any term or condition of employment.

(b) In any like or similar manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed in Section 7 of the Act.

2. Take the following affirmative action which I find will effectuate the purposes of the Act:

(a) Make Painter, Malzahn, Davis, Nevins, Kluth and Fuller whole for any loss of earnings in the manner set forth in the portion of this Decision entitled "The remedy."

(b) Post at its plant in Riverside, California, copies of the notice attached hereto as an Appendix.[5] Copies of said notice to be furnished by the Regional Director for the Twenty-first Region shall, after being duly signed by an authorized representative of the Respondent, be posted by it for a period of 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that such notices are not altered, defaced, or covered by any other material.

[5] In the event these recommendations be adopted by the Board, the words "A Decision and Order" shall be substituted for the words, "The Recommended Order of a Trial Examiner" in the notice. In the further event that the Board's order be enforced by a decree of the United States Court of Appeals, the words, "A Decree of the United States Court of Appeals Enforcing an Order" shall be substituted for the words, "A Decision and Order."

(c) Notify the Regional Director for the Twenty-first Region, in writing, within 20 days from the date of receipt of this Recommended Order what steps have been taken in compliance.[6]

Dated:

WALLACE E. ROYSTER,
Trial Examiner.

[6] If these recommendations are adopted by the Board, this provision shall be modified to read: "Notify the Regional Director for the Twenty-first Region, in writing, within 10 days from the date of this Order what steps Respondent has taken to comply herewith."

APPENDIX C

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are as follows:

SEC. 2. * * *

* * * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain

from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; * * *

* * * * *

SEC. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

U.S. GOVERNMENT PRINTING OFFICE: 1967

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IN THE

Supreme Court of the United States

October Term, 1966
No. 1036

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FLEETWOOD TRAILER CO., INC.

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF IN OPPOSITION.

Respondent accepts Petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?

Statement of Fact.

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was

[1]All dates hereinafter are in 1964.

scheduling production at the rate of 20 units per week [App. B, p. 30; Tr. 75, 98-99, 101, 103-104, 108, 122; Resp. Ex. 2].[2] On the following day, as a result of a breakdown in collective bargaining negotiations between the Company and the Union,[3] about half of the employees struck in support of their contract demands [App. B, p. 29; Tr. 100, 122]. It is conceded to have been an ordinary economic strike [Pet. p. 7, n. 7]. Upon commencement of the strike, the Company cut back its production schedule to ten units per week and reduced orders for materials accordingly [App. B, p. 30; Tr. 73, 76, 101-102, Resp. Ex. 2].

By August 18, the Company had hired about 20 new employees and some strikers had returned to work, so that its work force had increased to 71, sufficient work force to produce 15 units [App. B, p. 29; Tr. 76, 102, 109, 122; G.C. Ex. 11]. On that date, the Union ended the strike, accepted the Company's last contract offer, and requested reinstatement of the remaining strikers [App. B, p. 29; Tr. 63-66].

At the end of the strike it would have required a maximum of thirty days for the Company to overcome the physical problems caused by the strike and to return to pre-strike production levels [App. A. p. 18; Tr. 72-

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[2]"Tr." refers to the stenographic transcript of the unfair labor practice hearing, "G.C. Ex." refers to the NLRB General Counsel's exhibits, and "Resp. Ex." refers to the respondent Company's exhibits. These documents, together with "Volume 1, Pleadings," comprised the record in the Court of Appeals, and certified copies thereof have been filed with the Petition. "App." refers to appendices to the Petition for Certiorari, Appendix A being the Opinion of the Court of Appeals for the Ninth Circuit, and Appendix B being the Decision of the National Labor Relations Board. "Pet." refers to the Petition for Certiorari herein.

[3]San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America AFL-CIO.

73]. However, at that time, taking into account the supply of inventory units, and current production, the Company determined not to increase employment or production [App. A, pp. 18-19; Tr. 95-96]. That the Company's determination was made in good faith and was correct is proven by the undisputed fact that at the date of the openings here in contention, almost two months later [App. A, p. 18; Tr. 112] the work force actually decreased from seventy-one employees at the end of the strike to sixty-eight employees,[4] and production was 14 units, one less than capacity at the end of the strike [Tr. 103-104; Resp. Ex. 2]. Pre-strike production levels were not reached for almost five months after the strike ended [Tr. 104].

During the period October 8 through October 16, the Company filled six positions without giving preference to the complainant strikers. All the complainants were, however, hired for other positions shortly thereafter [Pet. p. 4].

The National Labor Relations Board concluded that the reduced production was only temporary and that the jobs had not been abolished. It therefore concluded that the Company had discriminated against the complainants as unreplaced strikers [App. B, p. 33].

The Court of Appeals, correctly referring to and applying the doctrine on scope of review established in *Universal Camera Corp. v. Labor Bd.* (1951), 340 U.S. 474, 487, found that the "General Counsel is unable to support the decision of the Board with

[4]The figure of 68 employees in early October is computed from the fact that subsequent to hiring of the six replacements which are the subject of this dispute, Fleetwood had only 74 employees [Tr. 112].

substantial evidence on the record taken as a whole. . . ." and held that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [App. A, p. 19].

Reasons Why Writ Should Not Be Granted.

1. Certiorari should not be granted because this case involves only a determination of fact decided under the rule established in *Universal Camera, supra.* Petitioner does not contend that the Court of Appeals relied upon any incorrect principle of law. It states at page 8 of the Petition the correct governing principle of law, *i.e.,* that strikers whose jobs have been abolished or absorbed have been replaced. The only issue it raises is whether the Circuit Court correctly applied this principle to the facts of this case. The Petitioner states:

> "The court below, in treating temporary job unavailability as the equivalent of job abolition, departed from these settled principles." (Pet. p. 8).

The Court did not treat "temporary job unavailability" as replacement. It found:

> ". . . . the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [App. A, p. 19].

In reaching its conclusion the Court applied the correct standard of *Universal Camera, supra* saying "the General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a

whole. . . ." [App. A, p. 19]. Its analysis in full is as follows:

> "Tested by this standard the record in these proceedings is devoid of any evidence to establish that the jobs of the six complaining strikers were still available on August 20, 1964, when they applied for reinstatement. The respondent had made a decision during the strike to curtail production. The work force at the end of the strike numbered seventy-one employees, and despite the testimony of the administrative vice-president of respondent that the longest it would take to secure any supplies would be thirty days [RT 73], respondent did not hire any additional employees until October 8, 1964, at a point when its labor force had fallen to sixty-eight employees—three less than at the end of the strike on August 18.
>
> "Petitioner's only support for its argument that the jobs had not been filled, abolished, or absorbed with responses by officers of respondent to questions of the representative of the General Counsel to the effect that respondent intended 'at sometime in the future' to increase production to twenty units per week:
>
> 'Q. But it was your intention to go back to twenty a week at some future time? A. Yes.' [RT 72].
>
> 'Q. And you did intend at all times to get production as quick as possible up to 20 trailers a week? A. Correct' [RT 111].
>
> "But such an intent directed to the future is not determinative of the question of whether or not the jobs had been abolished, tested as of the

> date when the strikers applied for work, two days after the strike ended. Whatever its intent, respondent did not increase its work force until two months after the strike ended, and did not attain the pre-strike level of production until five months after the strike. In light of these circumstances we do not find that the General Counsel has established that the jobs of complainants had not been absorbed or that they were still available. Rather, we believe that the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [Pet. App. A, pp. 18-19].

2. Certiorari should not be granted because the portion of the opinion of the Court of Appeals contested by the Solicitor General is dicta and not necessary to the decision of the case. Petitioner claims that the Court of Appeal relied on the "narrow and technical" holding that "whether or not a striker's former job had been eliminated is 'to be determined on the date on which the striker makes his offer to return to work' ". [Pet. p. 8]. As the Court's own analysis of the evidence quoted above at length indicates, the Court took into account both testimony as to the facts known and the employer's state of mind at the end of the strike, and the facts which had actually developed at the time the job openings occurred. Taken out of context the quoted statement amounts to no more than a truism—obviously if a striker is entitled to preference if unreplaced, the employer has to determine if he has been replaced when he applies for re-employment. But in any event, the quoted statement was not essential to determination of the case. As the lengthy quote above indicates, the evidence was

overwhelming as of the date of the openings that abolishment had taken place. Two months had gone by and employment had actually decreased. Thus, whenever the determination was made, the result in the Court of Appeals was correct.

3. Certiorari should not be granted because this record does not present a suitable vehicle for a Supreme Court determination. The issue in the case was whether these jobs had been absorbed or abolished. While the Respondent put on its direct testimony establishing clearly the reasons why it contended that the jobs had been abolished, the General Counsel presented no witnesses, and produced by cross-examination only the two questions quoted above in Item 1. Thus there was no thorough exploration in this record of all the various types of evidence which would guide the Court in establishing any general rules as to what constitutes abolishment.

Further the position of the National Labor Relations Board throughout this case has been that these employees were unreplaced economic strikers. The record shows that employment had declined from seventy-one employees at the end of the strike to sixty-eight employees at the time of the job openings. Thus, it appears that at least as to three of the job openings involved, this represents an ordinary "replacement of replacements" problem, totally unrelated to the issue supposedly raised.

4. Certiorari should not be granted because the decision of the Court of Appeals is probably correct. The issue in this case is whether jobs had been permanently abolished. The time involved in this case was almost two months. The only other two reported decisions on this

issue both reached the same result, although the times involved were shorter:

N.L.R.B. v. Roure-Dupont Mfg. (2d Cir. 1952), 199 F. 2d ....; one month; and

Atlas Storage Division (1955), 112 NLRB 1175; enforced *Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233; three days.

5. This case in no way resembles *N.L.R.B. v. Great Dane Trailers, Inc.*, No. 781, and therefore certiorari should not be granted on the basis of that case. In *Great Dane* the question presented is:

> "The Board found that the employer denied accrued vacation pay to striking employees who did not return to their jobs within about six weeks after a strike began, while awarding such benefits to those employees who did not strike or who abandoned the strike at an early date. The question presented is whether the Board properly held that this conduct violated Section 8(a)(1) and (3) of the National Labor Relations Act, in the absence of specific evidence of the employer's subjective intent to discriminate against the strikers."

Neither in the statement of the "question presented" nor in the Petition in *Great Dane* is there any discussion remotely related to what constitutes abolishment of a position. Conversely, in the present case no issue is presented as to the effect of the absence of an intent to discriminate in determining whether an unfair labor practice was committed. Petitioner contends that both cases deal with the legality of employer conduct which might deter employees from exercising their right to

strike, but Petitioner does not urge this Court to establish any new rule of law. Petitioner only contends that the Court of Appeals "departed from these settled principles" [Pet. App. A, p. 8] in examining a peculiar set of facts.

6. Certiorari should not be granted because the Solicitor General raises a novel issue not litigated or decided below. The Petitioner, by inference, and by the heavy emphasis placed on Article XIII of the Act, suggests that employees who have been replaced should be entitled to a preference in order to further protect their right to strike. This issue was neither briefed nor decided below.

Conclusion.

Wherefore, Respondent respectfully submits that this Court should deny the Petition for Certiorari.

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In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

OPINIONS BELOW

The opinion of the court of appeals (R. 95-105) is reported at 366 F. 2d 126. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 84-95) are reported at 153 NLRB 425.

JURISDICTION

The decree of the court of appeals was entered on September 8, 1966 (R. 106). By order dated Decem-

ber 8, 1966, Mr. Justice Douglas extended the time for filing a petition for a writ of certiorari to and including Sunday, February 5, 1967 (R. 107). The petition was filed on February 6, 1967, and was granted on April 10, 1967 (R. 108; 386 U.S. 990). The jurisdiction of this Court rests on 28 U.S.C. 1254 (1).

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*) are as follows:

Sec. 2. * * *

* * * *

(3) The term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless the Act explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by

any other person who is not an employer as herein defined.

* * * * *

Sec. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization:

* * *

* * * * * *

Sec. 13. Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifications on that right.

QUESTION PRESENTED

On the day a strike ended and the strikers sought to return to work, the employer announced that no jobs were available because of a reduction in production caused by the strike. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new employees, even though there were qualified strikers available who had continually made known their desire to return to work. The question presented is whether the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by thus preferring new workers over the returning striking employees.

STATEMENT

A. The Board's Findings of Fact

On August 5, 1964,[1] the Company, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week (R. 86; 39, 50-51, 55-56, 83). On the following day, as a result of a breakdown in collective bargaining negotiations between the Company and the Union,[2] approximately half of the employees struck in support of their contract demands (R. 85; 2, 5, 33, 51, 61). Because the strike had thus reduced its working force, the Company cut back its production schedule to ten

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[1] All dates hereinafter are in 1964.

[2] San Bernardino-Riverside Counties (California) District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL-CIO (R. 85).

units per week and curtailed its standing orders for raw materials accordingly (R. 86; 34, 38, 39, 51, 52, 54, 83).

By August 18, the Company had hired 21 new employees and some strikers had returned to work, so that its work force then numbered 71 (R. 85; 39, 47, 62, 81-82). On that date, the Union accepted the Company's last contract offer, terminated the strike, and requested reinstatement of the remaining strikers (R. 85; 34, 46-48). Although the Company intended to increase its production and work force to pre-strike levels "as soon as possible," [3] it explained to the Union that the curtailment in production caused by the strike precluded it from hiring any returning strikers "right at that moment" (R. 85-86; 35, 48, 51, 57); it attributed the expected delay in increasing production to the facts that some supply orders cancelled during the strike required 30 days to fill, and that inexperienced employees hired during the strike had to be trained (R. 85-86; 35, 37-38, 48, 51, 57, 62-63). The Company refused to put the employees who had remained on strike on a preferential hiring list, as requested by the Union. The Company asserted that it would consider them for openings on a nondiscriminatory basis if they made applications for employment and kept them current, but emphasized that it would be free to hire from any source. (R. 85; 34, 48.)

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[3] From their experience, Company officials knew that about 110 employees were needed to produce 20 units per week (R. 56). These levels were achieved by about December 13 (R. 86; 53, 83).

On August 20—two days after the strike ended—six strikers applied for reemployment, and on a number of occasions thereafter indicated to the Company their continued interest in returning to work (R. 86; 2, 5, 14, 17, 20, 23-24, 26-27, 29-31, 67, 71, 79). None of the new employees hired during the strike were specific replacements for these strikers (R. 87; 62-63, 81-82). Between October 8 and 16, the Company hired six employees who had not previously worked for it, for jobs which the striker-applicants were qualified to fill (R. 86, 88-89; 9-11, 16-17, 18-19, 21-22, 25-26, 28-29, 43-44, 46, 54-55, 57); none of these jobs was first offered to the striker-applicants (R. 86; 9). The six striker-applicants were reemployed between November 2 and December 14 (R. 86; 5, 8).

B. The Board's Decision and Order

The Board found that, when the six strikers applied for reemployment at the end of the strike in August, they had not been permanently replaced, since no one had been hired to fill their particular jobs. The Board further found that the lack of immediate openings at that time "was a temporary condition which the * * * [Company] knew would change and intended to change" by "return[ing] to full production and to a full crew as soon as practicable." (R. 87.) The Board concluded that, in these circumstances, the strikers were entitled to reinstatement as jobs reopened in October, in preference to new applicants for employment; and that the Company, by treating the strikers as though their employment status had terminated and by failing to reinstate them, had in-

terfered with and discriminated against them because of their strike activity, in violation of Section 8(a) (1) and (3) of the Act (R. 89-90). The Board ordered the Company to cease and desist from the unfair labor practices found and to reimburse the strikers for any loss of earnings attributable to the Company's failure to reinstate them at the time of the October hirings (R. 90, 91-92, 94-95).

C. The Decision of the Court of Appeals

The court of appeals, one judge dissenting, refused to enforce the Board's order. The court held that the right of an economic striker to reinstatement depends on business conditions and consequent job openings prevailing on the very day he first seeks reemployment. It reasoned that, since the curtailed production resulting from the strike rendered the striker-applicants' jobs unavailable on August 20, when they first sought reemployment, they thereby lost their right to reinstatement and to a preference over new employee applicants when jobs opened up in October. (R. 98-101.)

Judge Ely, dissenting, would have enforced the Board's order. In his view, since the Company admittedly intended to return to its pre-strike level of production and work force as soon as possible, the jobs of the striker-applicants could not properly be treated as having been "abolished," so as to terminate the reinstatement rights of the strikers (R. 103-104). The holding of the court, he concluded, unduly enlarged the risks imposed on employees who strike in support

of their economic demands, and "can have no other effect than to intimidate" them in the exercise of that "precious right" (R. 105).

ARGUMENT

The Company Violated Section 8(a)(1) and (3) of the Act by Failing to Reinstate the Strikers in the Jobs That Became Available as the Company Returned to Normal Levels of Production Following a Temporary Cut-Back During the Strike

A. *Introduction and summary*

Sections 7 and 13 of the Act (*supra*, p. 3) guarantee employees the right to strike, and Section 2(3) (*supra*, p. 2) preserves to strikers their status as employees under the Act. Section 8(a)(1) and (3) implements those guarantees by making it an unfair labor practice for an employer to interfere with employees in the exercise of their right to strike, or to discourage their participation in such activity by discrimination in employment. See *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U.S. 221, 233. An employer who refuses to reinstate strikers at the conclusion of an economic strike,[4] and instead prefers

[4] It is conceded that the strike here was an economic one, in support of the employees' collective bargaining demands, and not a strike caused by the employer's unfair labor practices. Accordingly, we do not discuss the right of reinstatement in the latter context. We merely note that unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements for them during the strike. See *Mastro Plastics Corporation* v. *National Labor Relations Board*, 350 U.S. 270, 278; *National Labor*

new employee-applicants, necessarily interferes with the right to strike and discriminates against the strikers because of that activity. Therefore, such an employer violates the Act unless he establishes that his conduct was motivated by "legitimate and substantial business justification * * *." *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 87 S. Ct. 1792, 1798. Even when the employer has such a reason, however, a violation of the Act may occur if the adverse effect of his conduct on the employees' right to strike is "inherently destructive" rather than "comparatively slight." *Ibid.* Moreover, it is the primary responsibility of the Board "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.* at 1797; accord, *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 228-229, 236.

Thus it is settled that, in the interest of maintaining operations during an economic strike, an employer may hire permanent replacements for the strikers;

Relations Board v. *Remington Rand, Inc.*, 130 F. 2d 919, 927-928 (C.A. 2).

Similarly, the strike was not unlawful in any respect and the strikers did not engage in any misconduct. Accordingly, we do not discuss the question of when such circumstances cause strikers to forfeit their right to reinstatement. See, generally, *Southern Steamship Co.* v. *National Labor Relations Board*, 316 U.S. 31; *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240; *W.L. Mead., Inc.*, 113 NLRB 1040. Cf. *National Labor Relations Board* v. *E.A. Laboratories, Inc.*, 188 F. 2d 885 (C.A. 2), certiorari denied, 342 U.S. 871; *National Labor Relations Board* v. *Thayer Co.*, 213 F. 2d 748 (C.A. 1), certiorari denied, 348 U.S. 883.

and he is not obliged to create positions for the strikers, when they seek to return to work, by discharging their replacements. *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333, 346. On the other hand, the employer may not offer super-seniority to replacements for strikers and to strikers who abandon the strike, even though that might be the only means by which he could attract sufficient personnel to maintain production; the giving of super-seniority impairs the right to strike so severely (more so than ordinary replacement) that the employer's business interest does not "outweigh the necessary harm to employee rights." *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 230-232, 236-237.

Nor need an employer create new positions for returning strikers whose jobs had been permanently abolished for substantial business reasons during the period of a strike. *Arthur H. Sumner*, 109 NLRB 234. But if job reduction or elimination be of a temporary nature, economic strikers are entitled to reinstatement. *National Labor Relations Board* v. *R. C. Can Co.*, 328 F.2d 974, 981-982 (C.A. 5); *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2).

The question presented here is whether an employer may properly treat the employment status of unreplaced economic strikers as terminated, and subsequently hire new employees in preference to them, merely because on the day that the strikers first applied for reinstatement their jobs were temporarily

unavailable, the employer having reduced production because of the strike. Applying the principles outlined above, we shall show that such conduct is "inherently destructive" of the right to strike and is supported by no "legitimate and substantial business justifications" (*National Labor Relations Board* v. *Great Dane Trailers, Inc., supra*, 87 S. Ct. at 1798), and therefore that the Board was warranted in concluding that the Company violated Section 8(a)(1) and (3) of the Act, even though there was no showing of anti-union motive. We shall also show that the court below, in refusing to enforce the Board's order, erred in equating temporary job unavailability with job abolition and in finding Board precedents dealing with the latter to be persuasive in this discrete case.

B. *The Company's action was "inherently destructive" of the right to strike, and was not privileged by any overriding business justification*

When the six strikers involved here applied for their jobs at the end of the strike, the Company had not permanently replaced them with other employees.[6] Moreover, while the jobs of the six strikers were not available when they first sought to return to work,

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[6] While 21 new employees had been hired during the strike, the work force was still about 39 employees below its normal complement of 110 (*supra*, pp. 4-5); and the Company made no effort to establish that the 21 new employees replaced any particular strikers (see, *e.g.*, R. 62-63). The burden of proving that a striker has been permanently replaced is on the employer. See *National Labor Relations Board* v. *Plastilite Corp.*, 375 F. 2d 343, 348 (C.A. 8); *M. Eskin & Son*, 135 NLRB 666, 668-669, enforced as modified, 312 F. 2d 108, 114, n. 3 (C.A. 2); *New Orleans Roosevelt Corp.*, 132 NLRB 248, 250.

this condition was merely a byproduct of the strike and was plainly transient. Thus, when the Company curtailed its production schedule during the strike, it reduced standing orders for raw materials accordingly; when these orders were renewed, a month or so was required to fill them. Also, as previously noted (*supra*, n. 5), the Company hired new employees during the strike, who had to be trained. For these reasons alone, the Company explained to the Union at the conclusion of the strike, it was not in a position to increase production or hire any strikers "right at that moment" (*supra*, p. 5). At all times, however, the Company intended to return to the pre-strike levels of production and employment "as soon as possible" (*supra*, p. 5). Indeed, in October, less than two months after the six strikers first sought reemployment, the Company hired six employees in preference to them (*supra*, p. 6).

The court of appeals, adopting the Company's position, held that the job rights of the strikers must be "tested as of the date when [they] applied for work" (R. 100), and, since their jobs were unavailable on that day, the strikers lost their employee status and their right to reinstatement—notwithstanding that the job unavailability was a temporary phenomenon directly attributable to the strike, that the Company intended to, and did, resume pre-strike levels of production and employment as soon as possible, and that the strikers had indicated their continuing desire to return to work by reporting periodically.

The court's view of reinstatement rights would seriously impair the right to strike. The object of any

strike is to exert pressure upon the employer by lessening his ability to carry on operations during the concerted walkout. Hence, if a strike is at all successful, it is likely that the normal level of production and complement of jobs will be curtailed. And, due to the nature of many enterprises, a complete resumption of operations cannot be effected at the moment the strike ends and the strikers apply for reinstatement. If the resulting temporary unavailability of positions permits an employer to deny the striker-applicants reinstatement when he subsequently reopens their jobs, and to prefer instead new employee-applicants, the ineluctable consequence is that employees will be deterred from striking. This would be particularly true in an industry in which a company was able to enjoy flexibility in adjusting its production levels, without, for example, risking permanent loss of customers. As Judge Ely pointed out below in dissent (R. 105), to subject strikers to that risk, "can have no other effect than to intimidate those who believe themselves to be economically aggrieved, especially those who, for long tenure, have earned valuable benefits * * *." Cf. *National Labor Relations Board* v. *Burnup & Sims*, 379 U.S. 21, 23-24. Indeed, the risk of job loss or other impairment of job security incurred by the strikers would increase, anomalously, in proportion to the effectiveness of their concerted action, *i.e.*, the more effective the strike in curtailing the employer's operations, the more jobs there will be temporarily unavailable at the end of the strike.[6]

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[6] Although the Company subsequently offered to, and did reemploy, the six strikers (*supra*, p. 6), it was as new em-

The risk to the strikers, and hence the impairment of their right to strike, is far greater than that involved in the employer's privilege to hire permanent replacements, sanctioned by *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U.S. 333. Replacement is not an inevitable consequence of striking, nor does the likelihood of replacement increase with the effectiveness of the strike. Rather, whether the employer will be able to find permanent replacements depends upon such largely fortuitous circumstances as the supply of labor available, and the skills needed by him and possessed by potential replacements. Similarly, no new or greater risk is

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ployees. Accordingly, under the decision below, the six strikers would not only lose several months' pay, but any seniority rights which they may have acquired prior to the strike, thereby rendering them vulnerable to discharge in an economic layoff ahead of the new employees the Company had earlier hired. To be sure, the Board stated (R. 90) that "[a]ll [six] of the affected individuals have been rehired and there is no claim that they were not fully reinstated." But that statement was made in discussing the remedy necessary to cure the violations found; the Board was not suggesting that the rehiring of the strikers gave them the full measure of security they had enjoyed before the strike.

It is, of course, settled that a returning striker whose employment status has not been terminated is not only entitled to reemployment ahead of equally qualified new employee-applicants, but also to retain seniority and other employment rights which he earned prior to the strike. See *National Labor Relations Board* v. *Acme Air Appliance Co.*, 117 F. 2d 417, 422 (C.A. 2), enforcing, 10 NLRB 1385, 1400-1401, 1403-1404; *National Labor Relations Board* v. *Robinson*, 251 F. 2d 639 (C.A. 6); *Editorial "El Imparcial", Inc.*, 123 NLRB 1585, 1586, 1600, enforced, 278 F. 2d 184, 187 (C.A. 1); *Republic Steel Corp.* v. *National Labor Relations Board*, 114 F. 2d 820 (C.A. 3).

imposed on strikers by denying them reinstatement if their jobs have been permanently eliminated or abolished for economic reasons. See discussion, *infra*, pp. 16-18. The disability of the strikers in that situation is essentially no different from that which any employee may incur, for there is always a risk that changes in economic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold.

The serious infringement on the employees' "precious rights" to strike (R. 105) that follows from the position of the majority below is not justified by any significant business interest on the part of the Company. Certainly the interest underlying an employer's right to hire permanent replacements—the need for personnel to carry on operations notwithstanding a strike—can not support the Company's hiring of new applicants in preference to strikers after the strike had ended and the strikers have indicated their desire to return to work. Nor can the interest underlying the permanent abolition of certain jobs—the need to adapt to changes in business conditions or to improve efficiency—support the Company's refusal to reinstate the striker-applicants when their jobs reopen after an admittedly temporary curtailment of production designed solely to meet the strike. Of course, the Board in fashioning the remedy took account of the temporary unavailability of jobs at the conclusion of the strike resulting from the curtailment of production during the strike.[7] But the Company's temporary

[7] The Board's backpay remedy runs from the date jobs became available in October to the date the striker-applicants

lower rate of production when the strike ended could not justify its refusal to reinstate the striker-applicants, and its preference for new employee-applicants, when it soon began to return to its pre-strike levels of production and employment in acordance with its consistent intention.[8]

In short, the Company's conduct is inherently destructive of the right to strike and serves no significant business purpose. The Board was thus warranted in finding that the Company violated Sections 8(a)(1) and (3) of the Act even though no anti-union motive was shown. *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, *supra*, 87 S. Ct. at 1798; *National Labor Relations Board* v. *Erie Resistor Corp.*, *supra*, 373 U.S. at 227-229.

C. *The court below erred in concluding that precedents concerning job abolition were controlling in this discrete situation*

To deprive strikers of employment status when their jobs are temporarily unavailable at the end of a strike goes beyond the usual job abolition situation. An employer might, for example, anticipate a reduc-

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were reemployed (R. 90, 91). See *R.C. Can Co.*, 140 NLRB 588, 597; *Cincinnati Steel Castings Co.*, 86 NLRB 592, 595, 623; *Electric Auto-Lite Co.*, 80 NLRB 1601, 1610; *Commodore Watch Case Co.*, 114 NLRB 1590, 1601.

[8] The Board found that the six striker-applicants were qualified for the six jobs which were reopened in October, and would have been reinstated by the Company had it considered them as employees rather than new applicants (R. 89; *supra*, p. 6). There is no evidence in the record as to the qualifications of the new applicants who were hired (R. 88).

tion in business for an indefinite period because of general economic or other business conditions. That retrenchment plan might be put into effect during a strike, with the consequent abolition of some jobs. See, *e.g.*, *Arthur H. Sumner*, 109 NLRB 234. Similarly, during the period of a strike but for substantial business reasons independent of it, an employer might decide that a particular production line was inefficient and should be automated or eliminated. Apart from duty-to-bargain considerations and assuming no anti-union motivation, there would be no unfair labor practice in refusing to reinstate strikers whose jobs thus had been abolished. Cf. *National Labor Relations Board* v. *R. C. Can Co.*, 328 F.2d 974, 981-982 (C.A. 5), enforcing 140 NLRB 588, 597-598. As we have pointed out (*supra*, p. 15), the risk of loss of employment because of changed economic conditions or business operations poses no new and additional threat to employees. However, the Board was, we submit, clearly correct in refusing to treat a temporary reduction in the number of jobs because the employer could not maintain full operations during a strike—a "temporary condition with the [Company] knew would change and intended to change" (R. 87)—as within the job abolition category.

Indeed, the situation where the striker's job is temporarily unavailable due to a reduction in production caused by the strike is not distinguishable in any meaningful sense from one where the striker's job is unavailable because of other temporary measures taken to meet the strike, *e.g.*, a temporary reschedul-

ing of production, or performance of the work by other employees under a makeshift arrangement. It is well settled that, in the latter situations, the striker's right to reinstatement is not lost, as it would be in the case of job abolition. See *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (C.A. 2); *National Labor Relations Board* v. *R. C. Can Co., supra; National Labor Relations Board* v. *Marydale Products Co.*, 311 F.2d 890, 891-892 (C.A. 5), certiorari denied, 375 U.S. 817; *Tyrrell County Lumber Co.*, 101 NLRB 155, 161; *Commodore Watch Case Co.*, 114 NLRB 1590, 1597-1601; *Philanz Oldsmobile, Inc.*, 137 NLRB 867, 871.

In concluding that temporary job unavailability as a result of reduced production due to the strike was the equivalent of job abolition (see *supra*, p. 12),[9] the court of appeals relied on two decisions of the Board. However, as the dissenting judge demonstrated (R. 104-105), those decisions are inapposite.

In *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, 1195, enforced, *sub nom. Chauffeurs Local 200* v. *National Labor Relations Board*, 233 F.2d 233, 238 (C.A. 7), the Board found that, during the strike,

[9] Contrary to the Company's assertion (Brief in Opposition, pp. 4-7), the conclusion of the court of appeals that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated" (R. 101) presents more than a substantial evidence question. The court's conclusion rests on the legally erroneous premise that temporary job unavailability due to a production loss caused by the strike is the equivalent of job abolition; the characterization of the facts for the purpose of determining the applicable legal rules is obviously not a pure substantial evidence question.

the striker's job had been in effect abolished because the employer had permanently lost customers. In *Brown and Root, Inc.*, 132 NLRB 486, 493-494, 521-522, the Board found that the strikers had been permanently replaced during the strike. Under these circumstances, the Board held that the strikers' employment status had been properly terminated prior to their requests for reinstatement, and thus that the employer was not required to seek them out when vacancies arose thereafter. Here, however, the Company neither permanently replaced the strikers nor underwent permanent changes in its operation which eliminated the jobs of the striker-applicants. Instead, it temporarily curtailed production solely because of the strike, fully intending at all times to return to pre-strike production and employment levels as soon as possible. Similarly, the jobs for which the six new workers were hired in October were not "vacancies" arising after the striker-applicants' initial request for reinstatement in August—*i.e.*, jobs which had been filled by other employees at that time (see *Atlas Storage, supra*, 112 NLRB at 1180, n. 15).[10] Rather they

[10] The Company urges (Brief in Opposition, p. 7) that, since it had 71 employees at the conclusion of the strike and only 68 before hiring commenced in October, it necessarily follows that three of the jobs for which new employees were hired in October had been previously held by replacements hired during the strike. This argument lacks merit. As noted (n. 5, *supra*), the employer, the party who has access to the necessary information, has the burden of proving for which jobs he has hired replacements. Here the Company offered no evidence to show that, during the strike, replacements had been hired for any of the particular jobs for which new employees were hired in October. Indeed, since the Company

were jobs which had been temporarily closed due to the production cutback and were being reopened in accordance with the Company's intention to resume full production. Finally, the Company was not required to seek out the striker-applicants since they had continually made known their availability and desire to return to work.[11]

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had about 110 employees prior to the strike and only 71 at its conclusion, it is more likely that all six jobs which were reopened in October were among the 35 or 40 jobs left temporarily unfilled at the conclusion of the strike due to the production curtailment.

[11] The Company contended below that the Union had agreed to a nonpreferential hiring list and thereby had waived any right the striker-applicants may have had to reinstatement ahead of new employee-applicants. The court of appeals did not reach the issue (R. 101). The record, however, amply supports the Board's findings (R. 86) that the Union merely "had bowed to the [Company's] decision" to adopt a nonpreferential hiring plan, *i.e.*, under the circumstances, the Union's submission could not be viewed as an effective waiver of the strikers' reinstatement rights. Plainly there was no real agreement between the parties. The Company simply insisted on a nonpreferential plan (R. 34, 48), and the Union, admittedly "rather unhappy" about the Company's position (R. 48), could not do anything about it. When the issue of reinstatement arose, the Union already had lost the strike and had been forced to accept the Company's pre-strike contract offer (R. 47-48). The Union received nothing in return for the nonpreferential plan; it was not even reduced to writing. Moreover, even if the Union had agreed to a nonpreferential plan, this would not have constituted an effective waiver of the employees' statutory right to reinstatement. *Electrical Workers Local 613* v. *National Labor Relations Board*, 328 F. 2d 723, 726-727 (C.A. 3); *National Labor Relations Board* v. *E.A. Laboratories, Inc.*, 188 F. 2d 885, 887 (C.A. 2), certiorari denied, 342 U.S. 871; *Laclede Metal*

Accordingly, neither *Atlas Storage* nor *Brown and Root* justifies the result reached by the court of appeals in this case. The situation here is more analogous to the cases of temporary readjustment, cited *supra*, pp. 17-18, which make clear that temporary conditions do not impair the reinstatement rights of strikers.

CONCLUSION

The judgment of the court of appeals should be reversed and the case remanded with instructions to enter a decree enforcing the Board's order.

Respectfully submitted.

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Supreme Court of the United States Rule 42 v

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) hereby respectfully moves for leave to file a brief as *amicus curiae* in the instant case in support of the effort of the National Labor Relations Board to have the decision of the court below reversed, as provided for in Rule 42 of the Rules of this Court. The consent of counsel for the petitioner has been obtained. Counsel for respondent has refused his consent.

INTEREST OF THE AFL-CIO

The AFL-CIO is a federation of one hundred twenty-nine affiliated labor organizations with a total membership of approximately thirteen million five hundred thousand. In *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 233-235 (1963), this Court recognized and emphasized, as it has in numerous decisions, Congress's solicitude for the right to strike since it is the "economic

weapon which in great measure implements and supports the principles of the collective bargaining system." In short, the Court recognized that the policy of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) as expressed in Sections 1, 7 and 13 is to achieve overall industrial peace by encouraging collective bargaining between parties who have relatively equal bargaining power. Inherent in this conception is the guarantee to employees of a meaningful right to strike. The strike is a limited weapon with a limited purpose. That purpose is to win beneficial changes in wages, hours, terms and conditions of employment. It is a limited purpose because even when those benefits are won, they are not won in perpetuity. Collective bargaining agreements are for limited terms and when they are subject to reopening, employers have the unfettered right to insist, in good faith, that past employee gains be undone. *National Labor Relations Board* v. *American National Ins. Co.*, 343 U. S. 395 (1952). Thus, as *Erie Resistor* recognizes, the Act must be construed so as to limit, in turn, the risks employees run by striking, see *National Labor Relations Board* v. *Burnup & Sims*, 379 U. S. 21 (1964); *National Labor Relations Board* v. *Industrial Cotton Mills*, 208 F.2d 87, 91 (4th Cir., 1953), certiorari denied, 347 U. S. 935.

Not every strike is won. Moreover, as this case illustrates, many strikers who participate in a losing strike wish to return to work for the employer on his terms. Indeed, in many situations, because of their skills or the general nature of employment opportunities in the area in which they live, they have no other choice. The compulsion on them to return is often heightened by the fact that they have valuable unvested benefits as employees of the employer, such as seniority, pension rights or accrued vacation pay, etc.; benefits they would forfeit if they went to work elsewhere, or if their tenure as employees were to be considered broken by the strike even though they are event-

ually reinstated. The issue in the instant case is the extent to which the Act protects a striker's right to reinstatement and his tenure as an employee. Given the realities of the situation, this issue is plainly of the most substantial importance to the labor movement. For this reason, the AFL-CIO, as the majority spokesman of organized labor, seeks leave to file a brief as *amicus curiae* in order to give the Court the fullest possible view of the problem presented for resolution here.

ISSUE NOT COVERED BY THE PETITIONER

The Board takes the position that an employer violates the Act if he refuses to honor a striker's continuing application for reinstatement as jobs open up, and at the first available opportunity, and instead hires a new applicant for employment. It qualifies its position, however, by assuming that there is no violation if the employer hires a new applicant for an open job, and bypasses the striker as long as the striker's job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the striker applied for reinstatement. This qualification is based on its reading of this Court's decision in *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346 (1938). We believe that this qualification is incorrect and that the employer has a duty to honor the striker's application as positions become available in all of the instances just noted. Moreover, we believe that the Board's position is based on a misreading of this Court's decision in *Mackay*. The main portion of our brief as *amicus curiae* will, therefore, be devoted to developing these points and to setting out and defending what we believe to be the proper rule of law that should govern here.

CONCLUSION

For the above stated reasons we respectfully urge the Court to grant this motion for leave to file the accompany-

ing brief *amicus curiae* in the instant case in support of the effort of the National Labor Relations Board to have the decision of the court below reversed.

Respectfully submitted,

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August 1967

IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 49

NATIONAL LABOR RELATIONS BOARD,
Petitioner

v.

FLEETWOOD TRAILER CO., INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

This brief *amicus curiae* is filed by The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), contingent upon the Court's granting the foregoing motion for leave to file a brief as *amicus curiae*.

The opinions below, jurisdiction, questions presented, and the statutory provisions involved are set out on pp. 1-4. of the brief of the National Labor Relations Board.

The interest of the AFL-CIO is set out on pp. v-vii of the foregoing motion for leave to file a brief as *amicus curiae*.

ARGUMENT

AN EMPLOYER WHO REFUSES TO GIVE EFFECT TO A STRIKER'S CONTINUING APPLICATION FOR REINSTATEMENT AND WHO BYPASSES THE STRIKER AND INSTEAD PREFERS A NEW APPLICANT FOR EMPLOYMENT VIOLATES THE NATIONAL LABOR RELATIONS ACT

It is well settled that an employer who has jobs available which he is filling at the time economic strikers request reinstatement may not bypass the strikers and prefer new applicants for hire.[1] Pursuant to Section 2(3) of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*) the strikers are employees and the employer has an obligation to honor their applications for reinstatement and to treat them in all matters involving continuity of employment as though they had not been absent from work. His refusal to do so necessarily interferes with the right to strike in violation of Section 8(a)-(1), and discriminates against the strikers because of their participation in concerted activity, protected by Sections 7 and 13, in violation of Section 8(a)(3). *National Labor Relations Board* v. *Industrial Cotton Mills,* 208 F.2d 87, 91-92 (4th Cir., 1953), certiorari denied, 347 U. S. 935; *National Labor Relations Board* v. *Robinson,* 251 F.2d 639, 641-642 (6th Cir., 1958); *Olin Mathieson Chemical Corp.* v. *National Labor Relations Board,* 232 F.2d 158, 160 (4th Cir., 1956), affirmed *per curiam* 352 U. S. 1020; *Republic Steel Corp.* v.

[1] The rules regarding the reinstatement rights of unfair labor practice strikers are different and we do not consider them here, see, e.g., *Mastro Plastics Corp.* v. *National Labor Relations Board,* 350 U.S. 270, 278 (1956); *National Labor Relations Board* v. *Remington Rand, Inc.,* 130 F.2d 919, 927-928. (2nd Cir., 1942)

National Labor Relations Board, 114 F.2d 820 (3rd Cir., 1940).

In the instant case, strikers who were participating in a losing economic strike made application for reinstatement on the employer's terms at a time when he was not filling any jobs. The strikers made it perfectly clear that their applications were of a continuing nature. (R. 85-86).[2] Nevertheless, the employer, without giving the strikers any notice that he had openings, subsequently hired, in preference to the strikers, new applicants for positions which the strikers were qualified to fill (R. 86-88-89). The question presented, of great practical importance but narrow legal scope, is thus whether an employer violates the Act not only when he refuses immediate reinstatement to strikers who apply for work when jobs are available, but also when he refuses to honor continuing applications for reinstatement as jobs open up and at the first available opportunity. The position of the AFL-CIO is that his conduct in the latter situation is equally a violation of the Act. The position of the Board, as we understand it, is that his conduct in the latter situation is a violation of the Act, except in instances where the strikers applied for reinstatement at a time when permanent replacements were filling their jobs or when the employer had decided to permanently abolish their jobs. The position of the Company and the Court below is that an employer's conduct in the latter situation is never a violation of the Act unless it is shown that he acted with an anti-union motive (R. 98, 99-100).

1. The reasoning which supports the conclusion that an employer cannot prefer new applicants to strikers who have applied for reinstatement is simple and compelling. Congress specifically provided, in Section 2(3), that strikers do not lose their status as employees, unless they forfeit it, see generally *National Labor Relations Board* v. *Local*

[2] "R" references are to the record as printed for this Court.

Union 1229 IBEW, 346 U. S. 464 (1953); and it provided, in Section 8(a)(1), a firm, clear guarantee against employer action to destroy that status. See *Industrial Cotton Mills, supra*, 208 F.2d at 91-92; *National Labor Relations Board* v. *Burnup & Sims*, 379 U. S. 21 (1964); cf. *National Labor Relations Board* v. *Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir., 1946). Naturally, these Sections of the Act, taken together, do not guarantee strikers remunerative work at the time they seek it, any more than their continued employee status entitles them to wages during the time they are withholding their services. Thus, if at the time they apply for work their jobs are filled by permanent replacements, the employer "is not bound to discharge those hired to fill the places of the strikers", *National Labor Relations Board* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345-346 (1938). By the same token, if their jobs are not open for economic reasons, the employer is not required to put them on the payroll immediately as nonproductive, redundant workers, *National Labor Relations Board* v. *Roure-Dupont Mfg. Co.*, 199 F.2d 631, 634 (2nd Cir., 1952).

On the other hand, Sections 2(3) and 8(a)(1) are not mere surplusage, and they do offer strikers meaningful protection that does not in any way impinge on normal managerial prerogatives. Cf. *National Labor Relations Board* v. *Darlington Mfg. Co.*, 380 U. S. 263, 268-269 (1965). They prevent employers from seizing upon the work stoppage as an occasion for reducing strikers to the status of new applicants for hire, who must enter into competition for jobs with other available workers, and who forfeit accrued but unvested benefits such as seniority, pension rights and vacation pay even if they are eventually reinstated. In short, these Sections continue and give substance to the court-made rule, see Restatement of Torts, Section 776 (1939), that an employer cannot regard a work stoppage in support of lawful demands as a basis for perma-

nently severing his ties with the strikers.[3] Those ties continue as a matter of law, regardless of the employer's view of the matter, see *Jeffrey-DeWitt Insulator Co.* v. *National Labor Relations Board,* 91 F.2d 134, 136-139 (4th Cir., 1937), certiorari denied 302 U. S. 731, cf. *Burnup & Sims, supra,* 379 U. S. 21. As we have just noted, this rule does not trench upon any right to make basic business decisions. To be sure, it compels the employer to use his striker-employees to carry out those decisions. But considering the fact that he hired them in the first place, when he had free and unfettered discretion, and never discharged them for any work-connected reason, any claim by an employer that this rule unduly interferes with the right to choose his employees freely would have a hollow ring.

It is, of course, true that under the decisions of this Court an employer may, absent an illegal motive, take steps such as building up inventory, continuing his business in face of the strike by hiring permanent replacements, etc., the primary effect of which, in the Court's judgment, is to blunt the economic pressure of the strike upon him provided that these steps have the least possible long term effect on the strikers, consonant with the achievement of that primary goal. *National Labor Relations Board* v. *Brown,* 380 U. S. 278, 283-284, 286 (1965); *Mackay, supra,* 304 U. S. at 345-346. However, if the employer resorts to

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[3] The Seventh Circuit put the essence of that rule as follows: *Iron Welders Union v. Allis-Chalmers Co.,* 166 F.45, 52 (7th Cir., 1908):

> "The employees who remain to take part in the strike or weather the lock out do so that they may be ready to go to work again on terms to which they shall agree—the employer remaining ready to take them back on terms to which he shall agree. Manifestly, then, pending a strike or a lock out, and as to those who have not finally and in good faith abandoned it, *a relationship exists between employer and employee that is neither that of the general relation of employer and employee, nor again that of employer looking among strangers for employees, or employees seeking from strangers employment.*" (Emphasis added)

actions the primary necessary effect of which is to injure the strikers far into the future, and well after the strike is settled, or which are not justified by compelling business necessity, or which simply penalize the strikers for going on strike, he has violated the Act. *National Labor Relations Board* v. *Erie Resistor Corp.*, 373 U. S. 221, 232-233 (1963): *National Labor Relations Board* v. *Great Dane Trailers, Inc.*, 388 U. S. 26 (1967).

Plainly, passing over a striker who has applied for reinstatement and preferring instead a new applicant, falls in the latter category. The employer's action does not denote a desire to win the strike, for that has already been accomplished; rather, it demonstrates an intent to punish the strikers, or at the least, to cow them so that they will not again have the temerity to engage in protected activity. *Cf. Ohio Ferro Alloys Corp.* 104 NLRB 542, 546 (1953), enforcement denied on other grounds, 213 F.2d 646 (6th Cir., 1954). These are not the type of legitimate business consideration which can justify interference with the right to strike. Indeed, in many cases, treating strikers as new applicants for hire, rather than employees, would allow employers to achieve the result condemned in *Erie Resistor*. The employer could merely turn to the other side of the same coin by depriving the strikers of previously earned seniority, instead of giving added seniority to the strike breakers. And in taking that step, he would not have the justification offered in *Erie Resistor*—that his action was necessary to keep his business operating during a strike.

2. The basic reasons for the rule which prohibits an employer from bypassing strikers in filling jobs open at the time of their application for reinstatement also require the employer who has no jobs immediately available to honor a continuing application as jobs become available, and at the earliest possible moment. Cf. *National Labor Rela-*

tions Board v. *R. C. Can Co.*, 328 F.2d 974, 981 (5th Cir., 1964), enforcing 140 NLRB 588, 597 (1963); *National Labor Relations Board* v. *Marydale Products Co.*, 311 F.2d 890, 891-892 (5th Cir., 1963), certiorari denied, 375 U.S. 817. Any other conclusion would create an exception which would tend to obliterate the rule.

A strike which causes economic dislocation to the employer, or even succeeds in closing him down, is not necessarily a successful strike. Employees on strike also suffer economic hardships; in many cases, the employer is able to outlast them and they may be forced to request reinstatement on his terms. It is not likely that he will need a full complement at that point. Customers will have drifted away, supply pipelines will have to be reestablished, machinery which has not been in use will have to be restored to an operative state. For example, if the employer's prestrike complement was one hundred men, ninety-five production workers and five maintenance people, and if the plant were shut down, he might well be in a position, because the plant must be put in running order, to rehire only the five maintenance men without injuring himself in any way. Under the theory of the court below, he could thereupon destroy the reinstatement rights of the remaining ninety-five.

Moreover, there will be situations that are far less clear-cut. The employer who has won a strike will often recognize that the achievement of victory was a far from painless process. He may be in a position where he has a choice between getting his full operation under way on the day the strikers seek reinstatement or, at the cost of some slight additional loss, delaying reopening for some time, or reopening by stages. Given the decision of the court below, taking the latter course would destroy the strikers' reinstatement rights, including such seniority and other accrued but unvested benefits as they may have. This would make

them more reluctant to employ concerted activities to secure additional benefits in the future, and it might also drive a good number of the "troublemakers" to take positions with other employers. This, in turn, would afford the employer an opportunity to hire new men who might well be more amenable to seeing his shop run on a non-union basis. Given the strong feelings engendered by labor disputes and the complexity of the task the Board would face if it had to prove bad faith in every case, the rule espoused by the court below would thus place a considerable temptation in the way of employers to seize on this method of penalizing employees who strike. The protection given striking employees, which has heretofore always been held to be a clear, firm guarantee, would thereby be materially weakened. Cf. *Burnup & Sims, supra*, 379 U. S. 21; *Industrial Cotton Mills, supra*, 208 F.2d at 91-92. In addition, to guard against this possible abuse, the Board would frequently have to go deeply into the employer's business decisions relating to restaffing at the conclusion of a strike, a procedure whose necessity should be limited, in the interests of efficient administration of the Act, wherever possible.

Naturally, as we have pointed out before, the value of the right to reinstatement is limited. It is not designed to protect employees at the expense of the employer. It is only designed to preserve the *status quo* as it existed at the time of the strike to the maximum feasible extent and to prevent unjustified employer-initiated changes in that status. Thus, where the strike causes long term dislocations by costing the employer business that he never regains, both suffer and the right to reinstatement remains inchoate. By the same token, if the employer changes his production process during the strike in a manner which permanently reduces his manpower needs and if there is no employee turnover thereafter, the strikers'

reinstatement rights are rendered less valuable.[4] Neither of these instances justifies bypassing strikers whose services are needed; they are examples of inherent risks implicit in the nature of the employee-employer relationship and in neither of them can it be said that the employer's action destroyed the strikers' rights. Bypassing strikers to hire new applicants, on the other hand, serves no legitimate interest; it is, purely and simply, a destructive act. The employer's interest in refusing to honor a continuing application for reinstatement when jobs become available is no stronger than his interest in refusing to honor an application made when he is actually filling jobs. In this connection it should be noted that the employer here has never given any reason for bypassing the strikers. See *Great Dane Trailers, Inc., supra,* 388 U.S. at 34-35. The only added element is that the employer would have to give the strikers reasonable notice of openings as they occurred. The key words in evaluating this burden are "reasonable notice". Surely, it is not too much to ask, with so much at stake, that he send a letter and make a call to the address left by the striker. Indeed, recall systems are a commonplace in the normal working arrangements of most employers since they are a rational response to a basic problem which grows out of the necessities of industrial relationships.

Employers know that normally they have a fluctuating need for labor because of the natural ebb and flow of demand in their product markets and because of the difficulties in maintaining a continuous regulated flow of sup-

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[4] Production changes during a strike may cause problems relating to the duty to bargain imposed by Section 8(a)(5) of the Act. We do not treat these problems here. See generally *Hawaii Meat Co.*, 139 NLRB 966 (1962), enforcement denied, 321 F.2d 397 (9th Cir., 1963); *Fibreboard Paper Products Corp.* v. *National Labor Relations Board*, 379 U.S. 203 (1964); compare *Railway Employees* v. *Florida East Coast R. Co.*, 384 U.S. 238, 246-248 (1966).

plies. This being so, they recognize that it is in their interest to have a rational system under which they can quickly meet an increased need for labor when it occurs. Thus, when they face a downturn, they do not normally sever their ties with the employees who are let go. A system is set up whereby both parties understand that when an upturn comes, the workers let go will be notified of openings and will have first call on the jobs that open up. In this sense, they are employees, employees here meaning that they have certain rights for positions they have the skill to fill, as against new applicants for work. In almost every union plant, this process of recall has been set out in the labor contract in explicit terms. For example, the following is the provision that appears in the illustrative contract Professors Cox and Bok have included in their Labor Law Cases and Materials (Statutory Supplement) 150 (6th Ed., 1966):

> "(E) Lay-offs and Recalls: In all cases of lay-offs and recalls following lay-offs, seniority as established by the applicable seniority lists shall govern. In cases of lay-offs, the last one in shall be the first one out, and in cases of recall, the last one out shall be the first one in."

See also BNA Collective Bargaining Negotiations and Contracts, Sec. 60.

3. To this point our argument, while it may diverge in some aspects of its reasoning, is in all essentials parallel to that of the Board. However, the Board believes that an employer must honor a striker's continuing application for reinstatement, when filling an open job the striker has the ability to perform, only if the striker's job was not considered to have been permanently abolished or was not being filled by a permanent replacement at the time the striker offered to return to work. See *Atlas Storage Division*, 112 NLRB 1175, 1179-1180, 1197 (1955), enforced, *sub. nom., Chauffeurs Local 200* v. *National Labor Relations*

Board, 233 F.2d 233, 238 (7th Cir., 1956); *Brown and Root, Inc.,* 132 NLRB 486, 493-494, 521-522 (1961), enforced as modified, 311 F.2d 447 (8th Cir., 1963). These cases rest on the assumption, shared by the Board and the lower courts, without exception but also without explanation, that in *Mackay, supra,* 304 U. S. at 345-346, this Court decided that permanent replacement of a striker at the time he applies for reinstatement destroys the striker's employee status. Thus, in order for the Board's theory to prevail here, it must show that the jobs of the strikers who made continuous application for reinstatement were not considered to have been permanently abolished and were not being occupied by permanent replacements at the time of the application. We propose a simpler standard which is more faithful to the Act itself and to the actual decision in *Mackay.* We submit that an employer must honor a striker's continuing application for reinstatement as jobs open up and at the earliest possible moment, without regard to whether his job was considered to have been permanently abolished or was being filled by a permanent replacement at the time the application was made.[5]

In *Mackay,* the Board found that the Company had discriminated against union leaders in reinstating strikers to fill open places at the end of a strike. The Court affirmed

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[5] One refinement of this statement, not immediately relevant here, must be noted. The fact that a job is unavailable because of temporary strike related business conditions is a valid reason for denying immediate reinstatement, see p. 4 *supra.* However the fact that a striker's job is being filled by a temporary replacement is not a valid reason for denying [redacted] him reinstatement, see cases cited on p. 17 *infra.* Thus in the latter situation even under the rule we suggest the question of whether the replacement was permanent or temporary would still be relevant. In the former situation, however, for the reason set forth above, we submit that the distinction between permanent and temporary economic effects of a strike is not relevant in determining the striker's rights.

that finding, and in the course of its discussion, stated, 304 U. S. at 345-346, 347:

> "Nor was it an unfair labor practice to replace the striking employes with others in an effort to carry on the business. Although §13 provides, 'Nothing in this Act shall be construed so as to interfere with or impede or diminish in any way the right to strike,' it does not follow that an employer, guilty of no act denounced by the statute, has lost the right to protect and continue his business by supplying places left vacant by strikers. And he is not bound to discharge those hired to fill the places of strikers, upon the election of the latter to resume their employment. The assurance by respondent to those who accepted employment during the strike that if they so desired their places might be permanent was not an unfair labor practice nor was it such to reinstate only so many of the strikers as there were vacant places to be filled. But the claim put forward is that the unfair labor practice indulged by the respondent was discrimination in reinstating striking employes by keeping out certain of them for the sole reason that they had been active in the union. As we have said, the strikers retained, under the Act, the status of employes. Any such discrimination in putting them back to work is, therefore, prohibited by §8.
>
> * * * * * * *
>
> "As we have said, the respondent was not bound to displace men hired to take the strikers' places in order to provide positions for them. It might have refused reinstatement on the grounds of skill or ability but the Board found that it did not do so. It might have resorted to any one of a number of methods of determining which of its striking employes would have to wait because five men had taken permanent positions during the strike but it is found that the preparation and use of the list, and the action taken by respondent, was with the purpose to discriminate against those most active in the union. There is evidence to support these findings."

As the Act was first proposed by Senator Wagner in 1934, it protected the employee status of strikers but explicitly denied that status to strike replacements. See 1 Legislative History of the National Labor Relations Act of 1935, 2 (G.P.O. 1949). If that bill had been enacted into law, economic strikers as well as unfair labor practice strikers, see *Remington Rand, supra,* 130 F.2d at 927-928, would, of course, have been given the right to displace permanent replacements, and to be reinstated ahead of new applicants for hire, see p. 2, *supra.* This would have meant that during a strike an employer would not have had the option of conducting his business in a normal manner by recruiting workers on the understanding that they could retain their jobs as long as their services were required and proved satisfactory. This point was stressed by management representatives, see e.g. 1 Leg. His. of the N.L.R.A., *supra,* 395, 464, 535, 721; and the clause denying employee status to strike replacements was dropped from the final version of the Act. Thus, seen in context, the Court's opinion in *Mackay* was simply a determination that both strikers and their permanent replacements were to be considered employees for the purposes of the Act. Therefore, Section 2(3) was not to be viewed as tipping the balance in favor of the strikers by requiring the employer to discharge the replacements.

There is not a word in the opinion, or so far as we have been able to ascertain in any subsequent opinion by this Court, that indicates that the Court took the further step of holding that the fact that they had been permanenly replaced at the time they applied for reinstatement deprived the strikers of their rights vis-a-vis new applicants for hire, should their jobs become open again, or of the protection implicit in their employee status against forfeitures of seniority and other accrued but unvested benefits, should they eventually return to work for the employer. There was no occasion for the Court to determine the

proper rule to govern this further and quite different question, since there were no new applicants in the picture. Indeed, the Court, throughout its opinion, referred to the replaced strikers as *employees;* and it apparently assumed that they would have the right to reinstatement if jobs opened up in the future, since it stated that there were "a number of methods of determining which of its striking employees would have to *wait* . . ." for reemployment. Certainly, the Court's reasoning does not require such an extension of what was decided. That reasoning is simply that the employer "has the right to protect and continue his business" and that inherent in that right is the capacity to hire new employees whom "he is not bound to discharge . . . upon the election of strikers to resume their employment", 304 U. S. at 345-346. There is nothing in this line of argument to suggest that the employer can use this permission, not only to protect and continue his business during the strike, but also to penalize the strikers, by taking action which is not essential to that primary purpose, after they have applied for reinstatement. Indeed, we read *Erie Resistor, supra,* 373 U. S. at 232, as indicating that the Court recognizes that *Mackay* does not in any way sanction employer action to penalize the strikers for engaging in protected activity. And as we have attempted to demonstrate thus far, an employer who bypasses strikers seeking reinstatement and instead hires new applicants for jobs, as they become available, is acting in a manner which, purely and simply, penalizes strikers. For the employer's legitimate interests are fully protected if he is permitted to run his business in a normal manner during the strike and if he is not required to reinstate strikers prior to the time when economic conditions permit him to do so. The rule we propose for adoption fully recognizes that interest. Thus, our argument here is that *Mackay* was a limited response to a limited legitimate interest, a response which should not be transmuted into an unlimited rule which goes be-

yond, and indeed, contradicts the basic reasoning of the decision.

A simple example should make our basic point clear. A striker's job is being filled by a permanent replacement on the day he makes a continuing application for reinstatement; however, three days later, the replacement is discharged for cause, or quits to take another permanent job, or becomes seriously ill. The employer then bypasses the striker and hires a new applicant for employment as a permanent employee to fill the job. In this situation, which is in essence that of *Atlas Storage Division, supra,*[6] what additional interest can the employer be said to be serving that was not present in the case where the job was temporarily unavailable at the time of the application? We do not believe that there is any additional interest. Of course, it might be argued that the employer is simply extending his power to fight the strike, but the man who helped him fight the strike has removed himself or has been removed from the scene, and the new hire has no strike to fight. In short, we suggest that as between a striker, with a continuing application for reinstatement, and a new applicant for employment there are no classes of open jobs. The reason the position was not originally available is without legal significance. Thus, the same rule—that the employer cannot bypass the striker and prefer the new applicant—should always apply. Interestingly enough, and we believe that this strengthens our position, the Board has recognized that the act of permanently replacing a striker, standing alone, does not destroy the striker's employee status. For it has held that if the replacement vacates the job prior to the striker's application, thereby leaving the job open, the employer must reinstate the striker. *Union Bus Terminal of Dallas, Inc.*, 98

[6] It could be argued that in *Atlas Storage Division* and in *Brown and Root, supra,* the strikers did not make continuing applications. If that is all those cases mean then they are simply irrelevant to the issue here.

NLRB 458 (1952); *Titan Metal Mfg. Co.*, 135 NLRB 196, 211 (1962).

We recognize that it might be argued that the erroneous view of the law we attack here has been frozen into the Act and cannot now be corrected. But we know of no rule of law or equity which requires this Court to acquiesce in an erroneous interpretation, by the Board and the lower courts, of one of its decisions, an erroneous interpretation which has no basis in logic or statutory law, and which, so far as we know, has never been relied on by this Court or even called to its attention. Nor is there any basis for saying that anything Congress did in amending the Act, in 1947 and 1959, precludes the adoption of our position.

In both 1947 and 1959 Congress did pass on the effects of *Mackay* on Section 9 representation elections, but it did not deal with Section 2(3), the cornerstone of our argument, which has never been amended, or with *Mackay's* effects on Section 8, the unfair labor practice section. Subsequent to *Mackay* and prior to 1947, there was heated controversy as to that decision's effect on the right of replaced strikers to vote in representation elections held during a strike. See *A. Sartorious & Co.*, 10 NLRB 493 (1938); *Rudolph Wurlitzer Co.*, 32 NLRB 163 (1941). In 1947, Congress responded by amending Section 9(c)(3) of the Act to provide that a striker, not entitled to reinstatement as of the date of the election, could not vote. 1 Legislative History of the Labor Management Relations Act of 1947, 10, 431, 553-554 (G.P.O. 1948). In 1959, this amendment was modified, and the Board was given the power to allow strikers, whose jobs were being filled by permanent replacements at the time of the election, to vote during the first twelve months of the strike. 1 Legislative History of the Labor Management Reporting and Disclosure Act

of 1959, 427-429, 452, 762, 763, 783, 941-942 (G.P.O. 1960); see *Pacific Tile & Porcelain Co.*, 137 NLRB 1358 (1962). Thus, the problem Congress has dealt with is far different from that presented for decision here. Following the logic of *Mackay*, Congress has limited itself to the consideration of the comparative rights of strikers vis-a-vis other employees who have permanent ties with the employer. On the other hand, as we have stressed, the issue here concerns the comparative rights of strikers vis-a-vis new applicants for hire.

4. Should the Court reject the argument we make in point 3, *supra*, it must determine whether the Board correctly concluded that the strikers' jobs were not being filled by permanent replacements and were not considered to have been permanently abolished at the time they applied for reinstatement. Since this is an affirmative defense to the unfair labor practice charge, the burden is on the employer. *National Labor Relations Board* v. *Plastilite Corp.*, 375 F.2d 343, 350 (8th Cir., 1967); *M. Eskin & Son*, 135 NLRB 666, 668-669 (1962), enforced as modified, 312 F.2d 108, n.3 (2nd Cir., 1963), cf. *National Labor Relations Board* v. *Mooney Aircraft Inc.*, 366 F.2d 809, 812-813 (5th. Cir., 1966). We need not go deeply into the issue of permanent replacement, for it is incumbent on the employer, at the minimum, to show that at the time he hired a new man or transferred a non-striking employee to the striker's job, he had a contemporaneous intention to supersede a striker on the payroll. In other words, he must show that his responses to the strike were not of a temporary or makeshift nature. *Firth Carpet Co.* v. *National Labor Relations Board*, 129 F.2d 633, 636 (2nd Cir., 1942); *Marydale Products Co., supra*, 311 F.2d at 891-892. In the instant case, as we read the record, the employer made no showing at all on this point. Turning then to the

question of permanent abolition, we submit that the employer must show that he acted on the basis of long-term structural factors which presented a reasonable basis for believing that his manpower needs, after he had recovered from the transient effects of the strike, would be less for the foreseeable future than they had been in the past. For example, it would be incumbent upon him to show an overall loss of business from which there was no reason to believe he would recover, or permanent labor saving changes in production techniques which are not counterbalanced by a contemplated expansion of business. In the instant case, the record, as made by the employer, proves that there were no permanent business losses or changes in techniques. The employer's problems were all strike-connected—the lack of supplies caused by cancellations of orders for them by the employer and the problems encountered in training replacements (R. 85-86). He intended at all times to return to prestrike levels of production and employment "as soon as possible" *ibid.* As Judge Ely noted in dissent, this simply is not a showing that the strikers' jobs had been ". . . do[ne] away with wholly" or "destroy[ed] completely"; and that is the showing which should be required (R. 103-104).

CONCLUSION

For the above stated reasons we respectfully submit that the Court of Appeals' decision should be reversed and that the Board's Order should be enforced. We further submit that in enforcing the Board's Order this Court should make it clear that an employer has an obligation to honor a striker's continuing application for reinstatement as jobs become available, and at the earliest possible moment, without regard to whether the striker's job was being filled by a

permanent replacement or was considered to have been permanently abolished at the time the application was made.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1967
No. 49

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

vs.

FLEETWOOD TRAILER CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

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FLEETWOOD TRAILER CO., INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

BRIEF FOR RESPONDENT.

Respondent accepts Petitioner's reference to the reports of the case below, jurisdictional statement, and citation of statutes involved.

Question Presented.

Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?

Statement of Facts.

Respondent Fleetwood Trailer Co., Inc. (hereinafter "Respondent"), is charged with discrimination in the rehiring of six strikers (hereinafter the "complainants")

in violation of Sections 8(a)(1) and 8(a)(3) of the Labor-Management Relations Act. It is conceded that any discrimination was purely technical for the General Counsel stipulated "that there is no issue in this case as to actual discrimination against these employees aside from the issue whether the employees had been replaced prior to their reapplication for employment." [R. 21].[1] The Trial Examiner specifically found:

> ". . . [N]o Union animus is alleged or shown. I am not convinced that the Respondent had a conscious purpose to discriminate against the strikers. . . ." [R. 89].

This finding was adopted by the National Labor Relations Board [R. 94] and approved by the Court of Appeals [R. 97].

On August 5, 1964, Respondent, a manufacturer of mobile homes, had about 110 employees and was scheduling production at the rate of 20 units per week [R. 86, 39, 51, 56]. On the following day, as a result of a breakdown in collective bargaining negotiations between Respondent and the Union, about half of the employees struck in support of their contract demands [R. 96, 85, 51, 61]. It is conceded to have been an ordinary economic strike (Pet. Br. p. 8, n. 4). Upon commencement of the strike Respondent cut back its production schedule to ten units per week and reduced orders for materials accordingly [R. 97, 86, 38, 39, 51, 83].

By August 18 Respondent had hired about 20 new employees and some strikers had returned to work, so

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[1] "R" stands for the printed record herein. "Pet. Br." stands for the Brief for the Petitioner. "Am. Br." stands for the Amicus Curiae Brief.

that its work force had increased to 71, sufficient work force to produce 15 units [R. 97, 85, 56, 62]. On that date the Union ended the strike, accepted Respondent's last contract offer, and requested reinstatement of the remaining strikers [R. 97, 85, 33-34]. Respondent, however, had no openings at that time [R. 97, 85, 34, 48].

At the end of the strike it would have required a maximum of thirty days for Respondent to overcome the business problems caused by the strike and to return to pre-strike production levels [R. 100, 37-38]. However, at that time, taking into account the supply of inventory units and current production, Respondent determined not to increase employment or production [R. 100, 86, 48-49]. That Respondent's determination was made in good faith and was correct is proven by the undisputed fact that at the date of the openings here in contention, almost two months later [R. 97, 86, 58] the work force actually decreased from seventy-one employees at the end of the strike to sixty-eight employees, and production was 14 units, one less than capacity at the end of the strike [R. 52-53, 83]. Pre-strike production levels were not reached until almost five months after the strike ended [R. 100, 86, 53].[2]

During the period October 8 through October 16, Respondent filled six positions without giving preference to the complainant strikers. All the complainants were, however, hired for other positions shortly thereafter (Pet. Br. p. 6).

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[2]Petitioner suggests the Company may have maintained reduced production deliberately to punish the strikers. However, as noted above, the Trial Examiner specifically found no anti-union animus and the record shows that the Company ceased hiring August 13, five days before the meeting which ended the strike and a week before the complainants re-applied [R. 82].

The National Labor Relations Board concluded that the reduced production was only temporary and that the jobs had not been abolished. It therefore concluded that Respondent had discriminated against the complainants as unreplaced strikers [R. 94, 89].

The Court of Appeals, correctly referring to and applying the doctrine on scope of review established in *Universal Camera Corp. v. Labor Bd.* (1951), 340 U.S. 474, 487, found that the "General Counsel is unable to support the decision of the Board with substantial evidence on the record taken as a whole . . ." and held that "the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [R. 101].

Summary of Argument.

Petitioner agrees that the Respondent was not required to give preference to the complainants if their positions had been abolished. Petitioner challenges the holding of the Court of Appeals that the positions had been abolished and were only later recreated on four grounds:

1. That the Court misapplied precedent;
2. That the Court formulated an incorrect test for determining abolishment;
3. That the Court of Appeals erred in its evaluation of the evidence; and
4. That the Court of Appeals upheld the Respondent without specific evidence in the record justifying failure to give preference.

The Court of Appeals correctly relied upon *Atlas Storage Division* (1955), 112 N.L.R.B. 1175 and *National Labor Relations Bd. v. Roure-Dupont Mfg.* (2nd

Cir. 1952), 199 F. 2d 631. Petitioner would distinguish those cases simply on the ground that "the striker's job had been in effect abolished because the employer had permanently lost customers." This distinction begs the question for the issue to be determined is whether the jobs had been abolished and the Court of Appeals found specifically that "the record here indicates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated."

Petitioner contends that the Court of Appeals established an incorrect test for determining if a position has been abolished by adoption of language originally formulated by Petitioner that "whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike." This quotation is taken out of context to make it appear that the Court was holding literally that if a job was not available on the day the strikers reapplied, they were forever barred from reinstatement. This language is correct when looked at in context. The question of replacement will ordinarily arise only when an employer proposes to hire someone, perhaps long after the strike, but the replacement does not occur when the new employee is hired—the rights of the striker were determined when he applied for work after the strike. Thus the statement of the Court of Appeals is literally correct, but in determining whether the position of the strikers had been abolished on the day that the strikers reapplied, the Court also correctly analyzed all the evidence including the course of business over the following five months.

In reviewing the record, the Court of Appeals, applying *Universal Camera* held that the finding of the

Board that the positions had been abolished was not supported by "substantial evidence on the record taken as a whole." This finding is correct. Two months after the strike when the new employees were hired there actually were fewer employes at the plant than at the end of the strike. Two months after the strike the plant was actually producing one less unit per week than its capacity at the end of the strike. The union business agents, fully apprised of all the facts, cooperated in implementation of a nonpreferential hiring procedure. It should be noted that at least explicitly, Petitioner does not rely on *Universal Camera.*

Petitioner, relying upon *National Labor Relations Board v. Great Dane Trailers, Inc.* (1967), 388 U. S. 26, contends that Respondent should have introduced specific evidence justifying its failure to grant preference to the "unreplaced" strikers. Respondent freely concedes that if the complainants had not been replaced, they were entitled to preference. The issue in this case, however, is whether they were replaced. Petitioner does not contend that *Great Dane* is applicable to permanently replaced strikers.

The Amicus Curiae brief urges this Court to overrule *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333, and the entire body of law which is developed under that case and hold that an employer must grant preference to strikers on new job openings, whether or not they have been replaced or their positions permanently abolished. This contention is not properly before the Court since it is not within the scope of the question presented which concerns an employer who allegedly "at all times intended to resume complete production as quickly as pos-

sible." Further, this issue was neither briefed nor decided below and the Labor Board has taken no position thereon. Decision of this question under these circumstances, it is submitted, would be improper for as this Court said in *Marine Engineers v. Interlake Co.* (1961), 370 U.S. 173, 185, "while the Board's decision is not the last word, it must assuredly be the first."

But if the Court should address itself to the issue raised by the Amicus brief, establishment of the rule therein sought would be improper because:

1. It would submit every employer who relied on the prior rule, followed "without exception" over the last thirty years, to an unfair labor practice charge and substantial liability for back pay, subject only to the statute of limitations.

2. The rule was approved by Congress in 1947 and 1959 for the legislative history shows that Congress was aware that strikers who have been replaced "have no right to reinstatement." The only amendment was to grant replaced strikers a right to vote.

3. Congress in 1947, in Section 9(c)(3) of the Act, used the term "entitled to reinstatement" indicating that Congress clearly recognized a difference in status between replaced and unreplaced strikers.

4. What the Amicus brief seeks is in fact a court imposed seniority system, an extremely sensitive area of labor relations in which it is submitted this Court should not innovate, particularly without a complete record and thorough consideration at the Board and Court of Appeals levels.

ARGUMENT.

I.

Positions of the Parties.

There is no dispute as to the fundamental principle of law applicable to this case, *i.e.*, that a striker whose job has been permanently abolished or absorbed by other employees is not entitled to reinstatement or preference as to subsequent openings. *Atlas Storage Division* (1955), 112 N.L.R.B. 1175, *enforced Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233; *National Labor Relations Bd. v. Roure-Dupont Mfg.* (2d Cir. 1952), 199 F. 2d 631.[3] The Court of Appeals determined that this rule applied to the facts in this case. Petitioner disagrees with the determination of the Court of Appeals on four points:

(1) That the Court of Appeals misapplied precedent to facts;

(2) That the Court of Appeals established an incorrect test for determining if abolishment of positions had occurred;

(3) That the Court of Appeals erred in evaluation of the evidence in the record; and

(4) That Respondent had a burden to show justification why the complainants were not given preference.

---

[3]See also *Bartlett-Collins Company* (1954), 110 N.L.R.B. 395, 397-398, *aff'd. American Flint Glass Wkrs. Union v. National Lab. R. Bd.* (D.C. Cir. 1956), 230 F.2d 212, *cert. denied* 351 U.S. 988; *Sax v. National Labor Relations Board* (7th Cir. 1948), 171 F.2d 769, 771.

Respondent submits that the question whether the complainants had been permanently replaced is essentially one of fact to be determined by the Board subject to the rules of review established in *Universal Camera.* Obviously whether abolishment has occurred will depend on the peculiar conditions of the particular industry and market. It seems to be precisely the situation this Court had in mind when it said:

> "Last term we made it plain that Congress charged the Courts of Appeals, not this Court, with the normal and primary responsibility for reviewing the conclusions of the Board. We stated that this Court 'is not the place to review a conflict of evidence nor to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other, though fair-minded judges could find it tilting either way.' *Labor Board v. Pittsburgh S. S. Co.,* 340 U.S. 498, 503 (1951). We repeat and reaffirm this rule, noting its special applicability to cases where, as here, a statutory standard such as 'good faith' can have meaning only in its application to the particular facts of a particular case."
>
> *Labor Board v. American Ins. Co.* (1952), 343 U.S. 395, 409-410.

The Court of Appeals for the Ninth Circuit specifically decided the case under *Universal Camera.* The issue having been raised, however, Respondent will show that the Ninth Circuit decision was correct.

II.

Under All Applicable Precedent, the Complainants Had Been Permanently Replaced.

The decisions of the National Labor Relations Board, and the United States Court of Appeals clearly hold that a striker is replaced and is not entitled to reinstatement where his job has been abolished or absorbed by other employees. *Atlas Storage Division* (1955), 112 N.L.R.B. 1175, *enforced Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd.* (7th Cir. 1956), 233 F. 2d 233 is very similar to this case and correctly states the law. In *Atlas* the employees went on strike which resulted in a loss of business to the employer and, as a result, an employee's work had been absorbed by other employees. Three days after the employee applied for reinstatement, another employee was injured, but the company hired a new employee and did not notify the striker. Both the National Labor Relations Board and the Seventh Circuit Court of Appeals held that the striker had been replaced and was not entitled to the position which subsequently came open.

> "Consequently, as his job was for economic reasons either abolished or absorbed by other employees he was not entitled to reinstatement on July 27. Upon these facts, we find that Respondent did not violate the Act in refusing to reinstate him."
>
> *Atlas Storage Division,* 112 N.L.R.B. 1175, 1180.

> "As we have found that Atlas was legally justified in refusing to bargain on May 25, Rodig was an economic striker. Consequently, as his job was for economic reasons either abolished or absorbed

by other employees, he was not entitled to reinstatement on July 27. Upon these facts, we find that Atlas did not violate the act in refusing to reinstate him.

"The examiner also concluded that Rodig, even if an economic striker only, was entitled to reinstatement when, three days after the application for reinstatement, an employee was injured and could no longer work. Atlas advertised for and hired a new employee. Rodig was not notified of the job, but he saw the advertisement. Nevertheless, he did not apply.

"The Board did not agree that Atlas was under any duty to recall Rodig on July 30—the date of the employee's injury—or any time thereafter. As Rodig's employment was properly terminated when he applied for reinstatement, Atlas' duty toward Rodig did not require seeking him out but merely refraining from discriminating against him should he request new employment. However, he never made any such request.

"As to Rodig, we believe that the Board's conclusion is correct. [Citing cases.]"

Chauffeurs, Team. & H. Etc. v. National Lab. Rel. Bd., 233 F. 2d 233, 238.

National Labor Relations Bd. v. Roure-Dupont Mfg. (2d Cir. 1952), 199 F. 2d 631 is somewhat different upon the facts, for the employer there contractually agreed to a preferential hiring list. However, as to four employees, an issue was whether they had been permanently replaced. The employer had suffered a reduction in business as a result of the strike and the

work of the four strikers had been done by three non-striking employees who continued to perform the work for a month after the unconditional offer to return to work. The Board had held that the replacements could "not be considered as occupying the positions permanently, but only as temporary replacements for three of the striking laboratory assistants, whose positions were therefore available for them on February 25, 1949." The court rejected this finding:

> "This conclusion does not appear to us to be supported by the evidence. The substitute employees admittedly continued their 'temporary' functions for a month after the strike ended. And the record is devoid of any evidence showing that respondent's business had become sufficiently revitalized after the strike to accommodate the employees whose positions the Board finds available on February 25. On the contrary, the evidence shows that respondent had lost a substantial amount of business because of the strike and that its operations only gradually returned to normal. Respondent is entitled to have its business condition immediately after the strike taken into consideration in connection with its obligation to reinstate strikers. [Citing cases.]"
>
> *National Labor Relations Bd. v. Roure-Dupont Mfg.*, 199 F. 2d 631, 634.

In *Brown and Root, Inc., Etc.* (1961), 132 N.L.R.B. 486, 494 the Board held that whether a striker has been replaced is to be determined on the date on which they make their offer to return to work, and they are not entitled to vacancies which arose subsequently if there

is no vacancy on the date on which they apply. The Board in this case simply ignored or dismissed these cases without discussion.[4]

Petitioner, which incidentally does cite a single lower court or Board decision on similar facts supporting its position, does not even discuss or attempt to distinguish *Roure-Dupont*. It attempts to distinguish its own precedent, *Atlas* and *Brown and Root, supra,* on the grounds that "the striker's job had been in effect abolished because the employer had permanently lost customers" (Pet. Br. p. 19). This distinction obviously begs the question. That is the issue and precisely the determination made by the Court of Appeals here: ". . . the record demonstrates that the jobs had been abolished or absorbed for an indefinite time and only later were they recreated." [R. 101].

III.

The Court of Appeals Correctly Confirmed the Board's Test for Abolishment.

Petitioner argues that the Court of Appeals established an incorrect test for determining whether replacement has occurred by quoting out of context the language of that Court "that whether or not a vacancy exists must be determined at the time the strikers apply for work after the strike." [R. 100]. That this statement is out of context is obvious since the Court analyzed facts occurring long after August 20 in determining whether replacement occurred [R. 100].

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[4]Judge Barnes, writing for the Court, termed this "cavalier use of precedent" [R. 99] while Judge Pope, concurring, stated "Plainly the holdings in those cases precisely fit the question raised here. . . . [The company] did exactly what the Board had held it had the right to do." [R. 102].

To understand the language of the Court of Appeals, the factual context must be understood. A question of replacement will ordinarily arise only when an employer proposes to hire someone, perhaps long after the strike. But replacement does not occur when the new employee is hired—the rights of the striker were determined when he applied for work after the strike. If the striker was replaced, or his job abolished, at that point he has no preferential rights to later positions. If not, he is entitled to preference as to the new position. This is what the Court of Appeals said, and it was simply quoting the Board itself which stated in *Brown & Root, supra,* at 493 that strikers were entitled to reinstatement "only if vacancies existed at the time they properly applied for reemployment."

Once the opinion of the Court of Appeals is clearly understood, it can be seen that there is no substance to the quibbling by Petitioner with the formulation by the Court of Appeals of the test for abolishment. Petitioner itself states quite succinctly why strikers who have been replaced are not entitled to preference, *i.e.*, "the disability of the strikers . . . is essentially no different from that which any employee may incur, for there is always a risk that changes in conomic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold." (Pet. Br. p. 15). To this might be added that in labor disputes as in all other litigation, issues must at some point be laid to rest and the parties freed to go forward with the job of producing goods.

IV.

The Record Demonstrates the Fact of Replacement.

In October Fleetwood had to make, without benefit of hindsight, its decision whether the complainants had been replaced. Fleetwood had this information:

1. The strike was over two months ago;
2. It had fewer employees now than it had had at the end of the strike—71 employees at the end of the strike versus 68 employees on October 8, 1964;
3. At the end of the strike it had sufficient employees to produce approximately 15 trailers, but in October was still only producing 14 trailers; and
4. The Union had agreed to a non-preferential hiring list and was cooperating in its implementation.

The Board can point to no evidence available early in October which shows that the complainants had not been replaced. The only fact it can cite is that pre-strike production levels were achieved in late December, but this was almost five months after the strike, and almost three months after Fleetwood had to make its decision in early October.

A. The Employment Statistics Prove the Fact of Replacement.

On August 18, 1964, Fleetwood had 71 employees. On October 19, 1964, *after filling the six positions here in suit,* Fleetwood had only 74 employees. Obviously, at least three of these positions could not be new positions but must have been replacements for

other employees having left since the strike. Besides showing that at least three of the complaining parties therefore must have been replaced, this very minute increase in the total number of employees is persuasive evidence that the reduction in production was a permanent abolishment of jobs.

B. The Unit Production Figures Prove the Fact of Replacement.

On August 18, 1964, Fleetwood had 71 employees, ordinarily sufficient employees to produce approximately fifteen units per week. Fleetwood did not produce even fourteen units per week until after the first five positions here in question had been filled. Fleetwood did not increase production to sixteen units per week (the precise figure of fifteen units per week was never an established level of production) until October 25, 1964, one week after the last position here in question had been filled. Again, it is clear that where a production level consistent with the number of employees on the payroll on the date of the end of the strike was not achieved until ten days after the last position here in question was filled, the striking employees must have been replaced.

After reviewing these facts, the quotation from the *Roure-Dupont Mfg.* case is again appropriate.

> "And the record is devoid of any evidence showing that respondent's business had become sufficiently revitalized after the strike to accommodate the employees whose positions the Board finds available on February 25. On the contrary, the evidence shows that respondent had lost a substantial amount of business because of the strike and that its operations only gradually returned to

normal. Respondent is entitled to have its business condition immediately after the strike taken into consideration in connection with its obligation to reinstate strikers."

National Labor Relations Bd. v. Roure-Dupont Mfg., 199 F. 2d 631, 634.

C. That the Union Officials, Fully Informed as to the Facts, Agreed to a Non-Preferential Hiring List Is Proof of the Fact of Replacement.[5]

Fleetwood witnesses testified that the Union was fully informed of the level of production at the plant, that the company had no vacancies at the present time, that it had no plans for further hiring, and that any increase in production was speculative. Fleetwood proposed a non-preferential hiring, list, clearly predicated on the position of the company that the strikers had been replaced. The Union representatives accepted the non-preferential hiring list and cooperated in its implementation. It should be noted that the Union representatives when called as witnesses simply stated they were unable to recall the nature of the hiring list [R. 58-61]. There is not an iota of evidence in the record that Fleetwood misrepresented to the Union the conditions which prevailed on August 18, 1964.

This is persuasive evidence of the fact of replacement. The designated bargaining representative of the complainants, fully informed as to the facts, agreed to a non-preferential hiring list. It should be noted

[5]Petitioner has consistently misconstrued this argument as concerned with "waiver". Respondent is not arguing that the union business representatives did or could waive the reinstatement rights of the complainants. The point is that the union representatives, knowing full well the implications of a non-preferential hiring list, agreed to it, acknowledging that in their opinion replacement had occurred.

this is not a case of putting something over on unsophisticated working men. These arrangements were made by business representatives of the Carpenters Union, a large sophisticated organization. If they had any doubts of the fact of replacement, they would have simply insisted on making an unconditional offer to return to work and let the fact of replacement be determined later. Instead they freely acquiesced in the non-preferential arrangement, clearly acknowledging replacement.

V.

The Great Dane Case Is Not Applicable to the Present Case.

Petitioner states the issue in this case as follows:

> "The question presented here is whether an employer may properly treat the employment status of *unreplaced economic strikers* as terminated, and subsequently hire new employees in preference to them, merely because on the day that the strikers first applied for reinstatement their jobs were temporarily unavailable, the employer having reduced production because of the strike." [Emphasis added.]

It then relies upon *National Labor Relations Board v. Great Dane Trailers, Inc.* (1967), 388 U.S. 26, to establish a burden on the employer to justify failure to grant preference to strikers in this situation. Respondent freely concedes that if the complainants were "unreplaced" economic strikers, they were entitled to preference, even before *Great Dane*. It was so stipulated at trial [R. 21]. Since Petitioner seeks to apply *Great Dane* only to "unreplaced" strikers, further discussion of that case is unnecessary.

VI.

Response to Amicus Brief.

The Amicus brief forthrightly asks this Court to overrule *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333 and all the cases after it, and hold that an employer must establish a preferential hiring list whenever a striker is not immediately re-employed, regardless of whether the striker has been permanently replaced or his position permanently abolished. It admits, however, that the Board and the lower courts "without exception" for thirty years have held that no such preference for strikers is required.

First, it is submitted that discussion of this issue in this case is not proper because it is not within the scope of the question presented on petition for writ of certiorari. Sup. Ct. Rules 42(5), 40(d)(2); *Irvine v. California* (1954), 347 U.S. 128, 129; *Hebring v. Lee* (1929), 280 U.S. 111, 117. The contention of Petitioner, on which certiorari was granted, was that an employer "which at all times intended to resume full production as quickly as possible" should grant preference to strikers on post-strike job openings.[6] The

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[6]The full statements of question presented in the respective briefs were:

> "On the day a strike ended, the employer announced that, because of a reduction in production caused by the strike, no jobs were available. Two months later, the employer, which at all times intended to resume full production as quickly as possible, hired six new workers, even though there were strikers who had continually made known their desires to return to work. The question presented is whether the employer violated Section 8(a)(1) and (3) of the National Labor Relations Act by thus preferring new workers

(This footnote is continued on the next page)

contention of the Amicus, that such preference must be granted at all times under all circumstances, presents a much broader issue.

Second, the Labor Board is primarily responsible for determining the detailed rules for implementing the national labor policy. The Board did not below consider the issue raised by the Amicus, and the General Counsel for the Board has not taken a position, or offered comments here. It is submitted, therefore, that this issue should not be considered here for as this Court said in *Marine Engineers v. Interlake Co.* (1962), 370 U.S. 173, 185: "While the Board's decision is not the last word, it must assuredly be the first."

But assuming that the issue is properly before this Court, the position of the Amicus is without merit. It is conceded that it has been the rule "without exception" for thirty years that an employer is not required to grant preference to strikers who have been replaced. Reversal of this rule would mean, subject only to the statute of limitations, that every employer who has relied on existing law and hired a new employee when a striker has not been recalled would be guilty of an unfair labor practice and subject to massive back pay liability. These employers, however, have relied upon innumerable decisions by the Board and decisions of every Court of Appeals.[7] Thus, in view of this long

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over the returning striking employees." (Petition for Writ of Certiorari p. 2).

"Whether the Court of Appeals correctly determined that the Board's finding that the positions of six economic strikers had not been absorbed or abolished was not supported by substantial evidence on the record taken as a whole?" (Brief in Opposition p. 1).

[7]Since the rule is not disputed, Respondent will not discuss the cases. They are collected in BNA, *Labor Relations Reference Manual Digest* §§52.3612, 52.3614.

consistent construction, relied upon by those regulated, if there is any ambiguity as to the intent of Congress, the interpretation thereof by the Labor Board, charged with its enforcement, and the lower courts over a long period of time will not be disturbed except for very cogent and persuasive reasons. *Sanford's Estate v. Commissioner of Int. Rev.* (1939), 308 U.S. 39, 52.[8] No such cogent and persuasive reasons are shown here. The rule, while perhaps arguable as a matter of first impression, is logical and in conformity with the statute.

Logically, as the Board states, once a striker has been replaced by hiring during the strike or abolishment of his position, his "situation is essentially no different from that which any employee may incur, for there is always a risk that changes in economic conditions or in efficiency of production may prompt the elimination of the jobs which some employees hold." (Pet. Br. p. 15).

As to the statute, section 9(c)(3)[9] thereof specifically grants replaced strikers only a right to vote and then only for a limited time. This suggests very strongly that additional rights were not intended. Moreover, section 9(c)(3) expressly uses the term "entitled to reinstatement." Since under the Amicus argument, every striker would be entitled to reinstatement, the result would be to render the quoted words mere surplusage. This Court has said it will not so construe a statute. *Jerecki v. G. D. Searle & Co.* (1960), 367 U.S. 303, 307-308.

It is submitted that the Amicus brief is in error in stating that neither the 1947 or 1959 amendments nor

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[8]See Annot. 84 L. Ed. 28, 30-31.

[9]29 U.S.C. §159(c)(3).

their history show that Congress was aware of the rule that replaced employees are not entitled to preference. The rule is based on *National Labor Relations Board v. Mackay Radio & Telegraph Co.* (1938), 304 U.S. 333 which was twice explicitly discussed. Senate Report No. 105 on S. 1126, I *Legislative History of the Labor Management Relations Act 1947,* 431 specifically states:

> "When elections are conducted during a strike, situations frequently arise wherein the employer has continued to operate his business with replacement workers. If such strike is an economic one and not caused by unfair labor practices of the employer, strikers permanently replaced have no right to reinstatement (*NLRB v. Mackay Radio,* 304 U.S. 333)."

Senator Pepper was critical of the Amendments on this issue, but explicitly recognized the rule:

> "That means, Mr. President, they have no right to get the job back, even if the strike be settled. The reported cited *NLRB v. Mackay Radio* (304 U.S. 333):"
>
> *Id.* Vo. 2 at 1101.

The Amicus contention contradicts the foregoing and would hold that replaced strikers have "some" right of reinstatement. Moreover, as pointed out above, both in 1947 and 1959 Congress passed amendments using the term "entitled to reinstatement" indicating knowledge of the rule and awareness that there is a distinction between replaced and unreplaced strikers.

What is sought by the Amicus is in fact a court imposed seniority agreement, and a typical clause is

even submitted. However, there is no more sensitive area in labor management relations than seniority clauses which are invariably the most carefully negotiated portions of a contract.[10] Some key issues are duration in time (few clauses are open-ended), the

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[10]BNA, *Collective Bargaining Negotiations and Contracts*, §60:1, cited by the *amicus*, summarizes the complexities well:

> "Procedures for handling force reduction are of prime importance in collective bargaining contracts, although in certain industries—notably construction—many agreements do not refer to layoff. There are conflicting interests to be reconciled here—the union's desire for maximum job protection and the employer's concern for maximum efficiency during periods of slack work.
>
> "Among contracts which refer to layoff, seniority is almost always a factor in determining the order of force reduction. In almost three cases out of four, it is the governing consideration. There is much variation, however, in the type of seniority applicable to layoff. In the automobile industry, for example, layoffs are commonly made by seniority within job classifications, whereas under many agreements the seniority unit is the department or the plant.
>
> "A further element in the degree of job security provided by a contract is whether or not 'bumping' is permitted. About 45 percent of agreements allow senior workers to claim jobs held by their juniors when their own work is suspended or abolished.
>
> "Roughly one of every two contracts provides for some type of exception to normal layoff procedures. Most often, union representatives are accorded top seniority—*i.e.*, are the last to be laid off. Some agreements permit management to retain employees whose skill and experience make them of particular importance during periods of depressed production.
>
> "Work-sharing provisions appear in about one of every five contracts. In most cases, such arrangements are intended to postpone layoffs or to furnish greater protection for workers who have been employed for a considerable period of time. A very few work-sharing plans, however, provide for division of available work among all employees, so that layoffs are avoided entirely.
>
> "In general, layoff procedures are applied in reverse when the workforce is increased. In other words, the last man laid off is the first to be rehired. Competency requirements, however, are somewhat more common in rehiring than in layoff."

group or area among which the choice is to be made, the standards to be applied (typical terms are "substantially equal", "head and shoulders above", "pure seniority," etc.). It is submitted this is not an area in which this Court should innovate without thorough briefing by all interested parties.

Wherefore, Respondent respectfully submits that the decision of the Court of Appeals for the Ninth Circuit should be affirmed.

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SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1967.

National Labor Relations Board, Petitioner, *v.* Fleetwood Trailer Co., Inc.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Fortas delivered the opinion of the Court.

Respondent is a manufacturer of mobile homes. On August 5, 1964, it employed about 110 persons. On August 6, 1964, as a result of a breakdown in collective bargaining negotiations between respondent and the Union,[1] about half of the employees struck. Respondent cut back its production schedule from the prestrike figure of 20 units to 10 units per week, and curtailed its orders for raw materials correspondingly. On August 18, the Union accepted the respondent's last contract offer, terminated the strike, and requested reinstatement of the strikers.

Respondent explained that it could not reinstate the strikers "right at that moment" because of the curtailment of production caused by the strike. The evidence is undisputed that it was the company's intention "at all times" to increase production to the full prestrike volume "as soon as possible." [2]

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[1] The Union is the San Bernardino-Riverside Counties District Council of Carpenters, United Brotherhood of Carpenters and Joiners of America, AFL–CIO.

[2] Respondent's production program was consistent with this intention. During a period of about 18 weeks after the strike, the number of units scheduled per week increased in a steady progression from 10 to 12 to 14 to 16 to 18 to 19 and, finally, to 20 for the week ending December 13, 1964.

The six strikers involved in this case applied for reinstatement on August 20 and on a number of occasions thereafter. On that date, no jobs were available, and their applications were rejected. However, between October 8 and 16, the company hired six new employees, who had not previously worked for it, for jobs which the striker-applicants were qualified to fill. Later, in the period from November 2 through December 14, the six strikers were reinstated.

An NLRB complaint was issued upon charges filed by the six employees. As amended, the complaint charged respondent with unfair labor practices within the meaning of §§ 8 (a)(1) and (3) of the National Labor Relations Act (29 U. S. C. §§ 158 (a)(1) and (3)) because of the hiring of new employees instead of the six strikers: After hearing, the Trial Examiner concluded that respondent had discriminated against the strikers by failing to accord them their rights to reinstatement as employees in October when respondent hired others to fill the available jobs. Accordingly, the Examiner recommended that respondent should make each of the six whole for loss of earnings due to its failure to return them to employment at the time of the October hirings and until they were re-employed. A three-member panel of the Board adopted the findings, conclusions and recommendations of the Trial Examiner.[3]

The Board filed a petition for enforcement of the order. The Court of Appeals for the Ninth Circuit, one judge dissenting, denied enforcement. 366 F. 2d 126 (1966). It held that the right of the strikers to jobs must be judged as of the date when they apply for reinstatement. Since the six strikers applied for reinstatement on Au-

[3] 153 N. L. R. B. 425 (1965). "The Board is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise." 29 U. S. C. § 153 (b).

gust 20, and since there were no jobs available on that date, the court concluded that the respondent had not committed an unfair labor practice by failing to employ them. We granted certiorari on petition of the Board. 386 U. S. 990 (1967). We reverse.

Section 2 (3) of the Act (29 U. S. C. § 152 (3)) provides that an individual whose work has ceased as a consequence of a labor dispute continues to be an employee if he has not obtained regular and substantially equivalent employment. If, after conclusion of the strike, the employer refuses to reinstate striking employees, the effect is to discourage employees from exercising their rights to organize and to strike guaranteed by §§ 7 and 13 of the Act (29 U. S. C. §§ 157 and 163). Under §§ 8 (a)(1) and (3) (29 U. S. C. §§ 158 (1) and (3)) it is unfair labor practice to interfere with the exercise of these rights. Accordingly, unless the employer who refuses to reinstate strikers can show that his action was due to "legitimate and substantial business justifications," he is guilty of an unfair labor practice. *NLRB* v. *Great Dane Trailers*, 388 U. S. 26, 34 (1967). The burden of proving justification is on the employer. *Ibid.* It is the primary responsibility of the Board and not of the courts "to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy." *Id.*, at 33–34. See also *NLRB* v. *Erie Resistor*, 373 U. S. 221, 228–229, 235–236 (1963). *Universal Camera Corp.* v. *NLRB*, 340 U. S. 474 (1951), is not an invitation to disregard this rule.[4]

[4] Although the decision of the Court of Appeals, as we read it, resulted from its erroneous holding that the right of the strikers to jobs depends upon the date of their (first) application for reinstatement, it recited that the Board's General Counsel had failed to show "that the jobs of complainants had not been absorbed or that they were still available." Such proof is not essential to estab-

In some situations, "legitimate and substantial business justifications" for refusing to reinstate employees who engaged in an economic strike have been recognized. One is when the jobs which the strikers claim are occupied by workers hired as permanent replacements during the strike in order to continue operations. *NLRB* v. *Mackay Radio & Telegraph Co.*, 304 U. S. 333, 345–346 (1938); *NLRB* v. *Plastilite Corp., supra; Brown and Root*, 132 N. L. R. B. 486 (1961).[5] In the present case, respondent hired 21 replacements during the strike, compared with about 55 strikers; and it is clear that the jobs of the six strikers were available after the strike. Indeed, they were filled by new employees.[6]

A second basis for justification is suggested by the Board—when the striker's job has been eliminated for substantial and bona fide reasons other than considerations relating to labor relations: for example, "the need to adapt to changes in business conditions or to improve efficiency."[7] We need not consider this claimed justification because in the present case no changes in methods of production or operation were shown to have been instituted which might have resulted in eliminating the strikers' jobs.

The Court of Appeals emphasized in the present case the absence of any antiunion motivation for the failure

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lish an unfair labor practice. It relates to justification, and the burden of such proof is on the employer. *NLRB* v. *Great Dane Trailers, supra*, at 34. Cf. also *NLRB* v. *Plastilite Corp.*, 375 F. 2d 343, 348 (8th Cir. 1967).

[5] Unfair labor practice strikers are ordinarily entitled to reinstatement even if the employer has hired permanent replacements. See *Mastro Plastics Corp.* v. *NLRB*, 350 U. S. 270, 278 (1956).

[6] The Trial Examiner found that "the six job openings in October could have been filled by the striker applicants and, had the Respondent considered them as employees rather than as mere applicants for hire, would have been so filled."

[7] Brief on behalf of N. L. R. B., p. 15.

to reinstate the six strikers. But in *NLRB* v. *Great Dane Trailers, supra,* which was decided after the Court of Appeals' opinion in the present case, we held that proof of antiunion motivation is unnecessary when the employer's conduct "could have adversely affected employee rights to *some* extent" and when the employer does not meet his burden of establishing "that he was motivated by legitimate objectives." *Id.,* at 34. *Great Dane Trailers* determined that payment of vacation benefits to nonstrikers and denial of those payments to strikers carried " a potential for adverse effect upon employee rights." Because "no evidence of a proper motivation appeared in the record," we agreed with the Board that the employer had committed an unfair labor practice. *Id.,* at 35. A refusal to reinstate striking employees, which is involved in this case, is clearly no less destructive of important employee rights than a refusal to make vacation payments. And because the employer here has not shown "legitimate and substantial business justifications," the conduct constitutes an unfair labor practice without reference to intent.

The Court of Appeals, however, held that the respondent did not discriminate against the striking employees because on the date when they applied for work, two days after the end of the strike, respondent had no need for their services. But it is undisputed that the employees continued to make known their availability and desire for reinstatement, and that "at all times" respondent intended to resume full production to reactivate the jobs and to fill them.

It was clearly error to hold that the right of the strikers to reinstatement expired on August 20, when they first applied. This basic right to jobs cannot depend upon job availability as of the moment when the applications are filed. The right to reinstatement does not depend upon technicalities relating to application. On the con-

trary, the status of the striker as an employee continues until he has obtained "other regular and substantially equivalent employment," (29 U. S. C. § 152 (3).) Frequently a strike affects the level of production and the number of jobs. It is entirely normal for striking employees to apply for reinstatement immediately after the end of the strike and before full production is resumed. If and when a job for which the striker is qualified becomes available, he is entitled to an offer of reinstatement. The right can be defeated only if the employer can show "legitimate and substantial business justifications." *NLRB* v. *Great Dane Trailers, supra.*

Accordingly, the judgment of the Court of Appeals is vacated and the cause is remanded for further proceedings consistent with this opinion.[8]

It is so ordered.

MR. JUSTICE MARSHALL took no part in the consideration or decision of this case.

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[8] The respondent contends that the Union agreed to a nonpreferential hiring list and thereby waived the rights of the strikers to reinstatement ahead of the new applicants. The Board found that the Union, having lost the strike, merely "bowed to the [respondent's] decision." The Court of Appeals did not rule on this point or on the effect, if any, that its resolution might have upon the outcome of this case. Upon remand, the issue will be open for such consideration as may be appropriate.

SUPREME COURT OF THE UNITED STATES

No. 49.—October Term, 1967.

National Labor Relations Board, Petitioner, *v.* Fleetwood Trailer Co., Inc.	On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[December 18, 1967.]

Mr. Justice Harlan, whom Mr. Justice Stewart joins, concurring in the result.

The issue in this case seems to me rather simpler, and the indicated resolution of it rather more obvious, than the majority opinion implies. A striking worker remains an "employee" at least as long as his job remains unfilled and he has not found other equivalent work.[1] Consequently, as the Court of Appeals stated in this case, "If their jobs had not been filled or eliminated due to a decrease in production, the strikers were entitled to be treated as employees and to be given preference over other job applicants." 366 F. 2d, at 128.

In the present case, full production was not resumed until two months after the strikers indicated their willingness to return to work. The only question is whether the six strikers here involved were still at that point "employees" whom the employer had an affirmative obligation to prefer. The trial examiner, whose decision was affirmed by the Board, concluded that the

[1] Section 2 (3), 29 U. S. C. § 152 (3), 61 Stat. 137, reads in part as follows:

"'The term 'employee' . . . shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .'"

strikers were still employees because the employer had neither abolished nor filled their jobs but intended at all times to return to full production "as soon as practicable." [2] The Court of Appeals found that the six had lost their employee status because their jobs were unavailable, by reason of a production cutback, at the precise and earlier moment when they offered to return to work. Yet it seems palpably inconsistent with the statutory purpose in preserving the employee status of strikers to hold that the temporary production adjustment occasioned by the strike itself is the equivalent of "permanent replacement" or "job abolition" and destroys the right of a striker to preference in rehiring. I would reverse the Court of Appeals on the basis of the trial examiner's conclusion that the employer's error was to see the strikers "only as applicants for employment who were entitled to no more than nondiscriminatory consideration for job openings. But they had a different standing—they were employees." 153 N. L. R. B., at 428.

The problems of "employer motivation" and "legitimate business justification" are not, on this view, involved in this case at all. The employer's obligation was not simply to be neutral between strikers and nonstrikers, or between union and nonunion personnel, an obligation that may give rise to questions concerning an employer's reasons, good or bad, for making employment decisions. This employer simply failed, for whatever reasons, to recognize the status given the six strikers by the Act, and his corresponding obligation to them. It did not assert in this Court any "legitimate business

[2] Nothing in the record suggests that the employer believed, or had reason to believe, that the six employees' offers to return to work had been revoked by October.

justification" whatever for refusing to rehire the six strikers in October; it claimed only that it did not need a reason. Since this claim was simply wrong, no question of "motivation" or "justification" need be reached here.

On this basis I concur in the judgment of the Court.